No. 137, Original

In The Supreme Court of the United States

STATE OF MONTANA,

Plaintiff,

v.

STATE OF WYOMING

and

STATE OF NORTH DAKOTA,

Defendants.

On Motion To Dismiss Bill Of Complaint

MONTANA'S BRIEF IN RESPONSE TO WYOMING'S MOTION TO DISMISS BILL OF COMPLAINT

MIKE MCGRATH
Attorney General of Montana

JOHN B. DRAPER
JEFFREY J. WECHSLER
Special Assistant Attorneys General
MONTGOMERY & ANDREWS, P.A.
Post Office Box 2307
Santa Fe, New Mexico 87504-2307
(505) 982-3873

CHRISTIAN D. TWEETEN
Chief Civil Counsel
SARAH A. BOND*
JENNIFER ANDERS
Assistant Attorneys General
215 North Sanders
Helena, Montana 59620-1401
(406) 444-2026

**Counsel of Record*

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OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Does Montana have a cause of action under the Yellowstone River Compact when Wyoming refuses to curtail its post-Compact depletions despite a call from Montana that such uses are preventing satisfaction of Montana's protected beneficial uses under the Compact, Art. V?

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I. STATEMENT

A. Introduction

The Court has agreed to hear Montana's Bill of Complaint, which seeks the Court's interpretation and enforcement of the Yellowstone River Compact. Montana alleges that Wyoming is violating the Compact by depleting the Tongue and Powder Rivers of the Yellowstone River system of water to which Montana is legally entitled under the Compact.

Wyoming has filed a Motion to Dismiss, urging that none of the means by which Wyoming is depleting the Yellowstone River system waters can be the basis of a claim. Wyoming asserts that the "Compact does not restrict Wyoming's depletions of the total annual water supply in a basin." Wyoming Motion to Dismiss 63 ("Wyo. Br."). Montana asserts that the Compact is a full equitable apportionment of the Yellowstone River Basin and that the means of diversion, depletion, and use are not relevant to the inquiry. Montana asserts that any material depletion of the supplies apportioned to Montana when Montana uses are unsatisfied is actionable.

B. The Yellowstone River Basin

The Yellowstone River Basin is described generally in Montana's Brief in Support of Motion for Leave to File Bill of Complaint Br. Supp. Compl. at 3-5. Maps of the area are appended thereto. The Basin consists of the Yellowstone River and its tributaries, including the Tongue River and the Powder River

which originate in Wyoming and flow into the Yellowstone River in Montana. Irrigation is the primary water use of the interstate tributaries in both States. The drainage area of the Yellowstone River comprises over 70,000 square miles, of which roughly 1,500,000 acres were being irrigated when the Compact was adopted in 1951. This irrigated land was fairly equally divided between Montana and Wyoming, with less than two percent (2%) in North Dakota. Senate Report No. 883 [hereinafter "Sen. Rep."], reprinted as Appendix A to this Brief at 10a.

C. The Yellowstone River Compact

Wyoming includes more than twenty (20) pages of compact history in its Motion to Dismiss Montana's Bill of Complaint, much of which is argumentative and not germane to the question presented. See Wyoming's Motion to Dismiss Bill of Complaint 12-35 [hereinafter Wyo. Br.]. The following history is pertinent to the Court's consideration of the issue.

1. A Brief History of Compact Negotiations

The Compact of 1951 was the culmination of almost twenty years of negotiations. Congress passed its first authorization for the States to enter into such an agreement in 1932. See *Act Granting the Consent of Congress to the States of Montana and Wyoming to Negotiate and Enter Into a Compact Agreement for Division of the Waters of the Yellowstone River*, 47 Stat. 306 (1932).

The first Compact was signed in February 1935. It concerned only the States of Montana and Wyoming, and was never acted upon by the legislatures. The second Compact was negotiated in 1942 and went to the legislatures of Montana, Wyoming, and North Dakota in 1943. The Wyoming legislature was the first to take action on this compact and failed to ratify it. A third Compact, similar in form to the previous Compact, was negotiated in 1944, and reached the Legislatures of Montana, Wyoming, and North Dakota in 1945. This Compact was ratified by North Dakota, Montana, and Wyoming, but was vetoed by the Governor of Wyoming. The Compact of 1951 was the fourth Compact to be negotiated between Montana and Wyoming, and was finally approved by all three States and Congress in 1951. Sen. Rep. App. A at 10a; 65 Stat. 663 (1951).

A primary motivation for the Compact was the desire for water storage development. See 82d Congress, House of Representatives Report No. 1118 [hereinafter "House Rep."] reprinted as Appendix B to this Brief, at 12b ("It long has been recognized that the maximum beneficial use of the water resources of the Yellowstone River Basin contemplated in Senate Document No. 191 [Pick-Sloan Plan for Missouri River Basin] is dependent entirely upon the construction and operation of storage reservoirs to regulate and conserve the water yields of the principal streams of the basin."). The Yellowstone Basin was the subject of study for water storage projects, but the United States made it clear that no federal projects

would be built until Wyoming and Montana came to an agreement about the allocation of interstate waters: "The compelling reason for the negotiation of a compact was the need for agreement on division of waters of interstate tributaries in the Yellowstone River Basin that would allow further development to go forward." Sen. Rep. App. A at 14a.

Complicating this task was the lack of accurate water rights data reflecting actual uses in either State. At the time, Wyoming had a centralized system of permit filings that did not reflect actual uses, whereas Montana had no centralized system, but instead relied on actual uses, as well as county filings and court decrees. See October 10, 1940 Minutes of Yellowstone River Compact Commission, reprinted as 1940 Yellowstone River Compact Comm'n Mins. Appendix C to this Brief at 7c-12c. These uncertainties plagued the work of the Yellowstone Compact Commission throughout the process. Early drafts of the Compact attempted to allocate to each State a percentage of the total water, with each State then dividing its percentage share among its users on the basis of state law. But without accurate data regarding existing uses, neither State was confident that its percentage allocation was equitable or adequate to meet existing needs. Both States agreed, however, that existing rights needed to be recognized in the Compact. Sen. Rep. App. A at 15a.

Recognizing the urgency of an agreement on division of waters to allow further development for storage (Sen. Rep. App. A at 15a), the Commission

ultimately abandoned its effort to allocate all water by percentages among the States, and instead chose a different model. That model, as reflected in Article V, distinctly recognizes existing rights without quantification, reserves a "preferential" place for supplemental water supplies to existing acreage, and allocates by percentages only the remainder to serve future water uses.

In its final report to the Senate, the Committee on Interior and Insular Affairs observed:

> "The compact appears to be fair and equitable in apportioning the use of water of the Yellowstone Basin, as defined. The compact provisions are easily administered, and require no elaborate organization. In all respects, it presents an unusually practicable solution to the problems which, during the early years of negotiation, seemed highly complicated and difficult. *Id.* at 2a.

2. The Article V Apportionment

The Yellowstone River Compact of 1951 equitably divides and apportions the water of the Yellowstone River Basin among the States of Montana, North Dakota, and Wyoming. It begins by declaring the intent of the signatory States "to remove all causes of present and future controversy" between the States "with respect to the waters of the Yellowstone River and its tributaries." The Compact further articulates the States' desire "to provide for an equitable division and apportionment of such waters," and declares that

they "have resolved to conclude a Compact . . . for attainment of these purposes." 65 Stat. 663; Appendix to Montana's Bill of Complaint (hereinafter App. to Compl.) at A-1, A-2.

The apportionment provisions of the Compact appear in Article V: "The apportionment, or division, of the waters of the basin is provided in article V, subsections A, B and D." Sen. Rep. App. A at 3a. Article V.A declares:

> "Appropriative rights to the beneficial uses of the water of the Yellowstone River System existing in each signatory State as of January 1, 1950, shall continue to be enjoyed in accordance with the laws governing the acquisition and use of water under the doctrine of appropriation." App. to Compl. at A-8.

Article V.B then allocates the "unused and unappropriated waters of the Interstate tributaries of the Yellowstone River as of January 1, 1950." The first clause of V.B allocates to each State "such quantity of that water as shall be necessary to provide supplemental water supplies for the rights described in paragraph A of this Article V, such supplemental rights to be acquired and enjoyed in accordance with the laws governing the acquisition and use of water under the doctrine of appropriation." The second clause of Article V.B allocates by percentages the remainder of the unused and unappropriated water, i.e., whatever is left after V.A pre-Compact rights and V.B supplemental rights are satisfied, for "storage or

direct diversions for beneficial use on new lands or for other purposes." *Id.* at A-8, A-9.

Article V.C sets forth the algebraic formula whereby the parties' uses of "unused and unappropriated" water allocated by percentage are to be measured. *Id.* at A-9, A-10. Article V.D recognizes existing rights to the beneficial uses of waters of the Yellowstone River as between Montana and North Dakota, and sets forth the method for allocation during the irrigation season. *Id.* at A-10, A-11. Article V.E excludes from the Compact domestic and stock water uses, as well as devices and facilities for the control and regulation of surface waters. *Id.* at A-11. Article V.F requires the Commission to reexamine the allocations made and, upon unanimous agreement, recommend modifications therein as are fair, just, and equitable. *Ibid.*

Viewed as a whole, Article V articulates a comprehensive scheme for the apportionment of all water in the basin on the basis of a three-tiered model: (1) existing beneficial uses; (2) supplemental supplies for the rights protected in Article V.A; and (3) new uses. Under this model, pre-Compact rights in all three States take first priority, and are apportioned under the Compact in whatever amounts were then being put to beneficial use. Any unused and unappropriated water left over after pre-Compact rights are satisfied may then first be used to supplement those rights protected in Article V.A. Thereafter, any remaining water is subject to a percentage allocation as between Wyoming and Montana.

D. Montana's Bill of Complaint and Wyoming's Motion to Dismiss

Montana submitted its Motion for Leave to File a Bill of Complaint against Wyoming and North Dakota in January 2007.[1] The Bill of Complaint generally alleges that Wyoming has violated Article V of the Yellowstone River Compact. More specifically, Wyoming is alleged to have violated Article V by refusing to curtail its consumption of water for post-Compact uses when such consumption depletes Montana's apportioned share of the interstate waters. (Compl. ¶¶ 8-12). In response to this Court's invitation, the Solicitor General filed a brief recommending the Court grant Montana's motion and allow Wyoming to submit a motion in the nature of a Rule 12(b)(6) motion to dismiss under the Federal Rules of Civil Procedure. This Court granted Montana's Motion for Leave to File on February 19, 2008, and granted Wyoming leave to file the suggested motion. *Montana v. Wyoming & North Dakota*, 128 S. Ct. 1332 (2008). Wyoming filed its Motion to Dismiss on April 4, 2008. Anadarko Petroleum Corporation filed a Motion for Leave to File Amicus Brief and Amicus Brief in Support of Wyoming on April 25, 2008.

The first thirty-five pages of Wyoming's Brief presents a "*Statement of Facts Material to the Question*

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[1] Montana named North Dakota because it is a party in the Compact, but sought no relief against that State. North Dakota has not filed an appearance herein.

Presented." Appended to the Brief are numerous excerpts from pre-Compact correspondence and reports, as well as post-Compact documents.[5] As it did in its Brief in Opposition to Motion for Leave to File (Wyo. Br. Opp.), Wyoming asserts that Montana fails to state a claim upon which relief can be granted. Compare Wyo. Br. Opp. 15-17, with Wyo. Br. 59-64 (groundwater); Wyo. Br. Opp. 17-20, with Wyo. Br. 55-58 (increased consumption); Wyo. Br. Opp. 20-23, with Wyo. Br. 50-54 (storage); and Wyo. Br. Opp. 23-28, with Wyo. Br. 54-55 (increased acreage).

The essence of Wyoming's argument is that "[t]he Compact does not restrict Wyoming's depletion of the total annual water supply in a basin." Wyo. Br. 63. In Wyoming's view, Montana has not alleged any cognizable injury from Wyoming's use of water because none of the alleged violations (construction of new storage reservoirs, irrigation of new acreage, increased consumption on existing acreage, and groundwater depletions) constitute a violation of the Compact. *Id.* at 63. According to Wyoming, "claims based on depletion or consumption must be dismissed." *Id.* at 3.

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[5] Not all of the documents contained in Wyoming's Appendix were cited in its Brief. See Wyo. Br. at App. 21, 31, and 34 (documents not cited).

II. SUMMARY OF ARGUMENT

Montana brought this original action seeking interpretation and enforcement of the Yellowstone River Compact. Montana has alleged that Wyoming has refused to curtail its post-Compact depletions when they interfere with Montana's Article V rights. Wyoming has filed a Motion to Dismiss, arguing that Montana's bill of complaint states no cause of action under any facts. For determining this motion, assumed to be Montana's allegations in the bill of complaint are true. Therefore, the question before the Court now is whether Montana has a cause of action when Wyoming refuses to curtail its post-Compact depletions despite a call from Montana that such uses are preventing satisfaction of Montana's protected beneficial uses under the Compact, Article V.

Wyoming's understanding of the Compact is fundamentally at odds with that of Montana. On the basis of the Compact language itself, as well as official legislative history, Montana understands the Compact to fully and equitably apportion the total water supply of the Yellowstone River Basin, as defined. When one State takes too much water without regard to satisfaction of downstream requirements, it commits a Compact violation, because the downstream State is deprived of its share to the same degree. There is no water unaccounted for.

The Compact sets up a three-tiered priority of uses – existing uses, supplemental uses, and new uses – for the privilege and protection of all three

States. These three tiers are more broadly defined as either pre-Compact or post-Compact uses. Wyoming violates the Compact whenever its post-Compact uses deplete the supply below that needed to satisfy Montana's apportioned share, including pre-Compact uses.

Wyoming ignores its obligations under the Compact. On the basis of extrinsic evidence, and without explaining the plain text of the Compact itself, Wyoming argues that its methods of depletion are not addressed in the Compact and therefore cannot be a basis for a Compact violation. Whatever that method may be, depletion of waters apportioned to another State constitutes a violation of the Compact, and this Court has recognized a cause of action under such circumstances to address the violation.

This Court has often stated that it is empowered to resolve disputes between States over interstate river compacts. This is such a dispute. Montana has alleged that Wyoming is taking a part of the water to which Montana is entitled under the Yellowstone River Compact. This case fits squarely within the Court's precedents on this subject.

III. ARGUMENT

A. Wyoming's Motion to Dismiss Should Be Denied Because It Does Not Meet Threshold 12(b)(6) Standards.

1. Standard for Motion to Dismiss

Rule 12(b)(6) of the Federal Rules of Civil Procedure allows a claim to be dismissed for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). Thus, Rule 12(b)(6) "authorizes a court to dismiss a claim on the basis of a dispositive issue of law." *Neitzke v. Williams*, 490 U.S. 319, 326 (1989). For that reason, the Court assumes that the factual allegations in the Complaint are true. *Bell Atl. Corp. v. Twombly*, ___ U.S. ___, 127 S. Ct. 1955, 1965 (2007).

In this case, the following factual allegations regarding post-Compact development in Wyoming are assumed to be true:

(1) Wyoming refuses to curtail its consumption of the waters of the Tongue and Powder Rivers (Compl. ¶ 8);

(2) Wyoming has allowed construction and use of new and expanded water storage facilities in the Tongue and Powder River Basins (Compl. ¶ 9);

(3) Wyoming has allowed new acreage to be put under irrigation in the Tongue and Powder River Basins (Compl. ¶ 10);

(4) Wyoming has allowed the construction and use of groundwater wells for irrigation and for other uses and has allowed the pumping of groundwater associated with coalbed methane production in the Tongue and Powder River Basins (Compl. ¶ 11);

(5) Wyoming has allowed the consumption of water on existing irrigated acreage in the Tongue and Powder River Basins to be increased (Compl. ¶ 12);

(6) Wyoming has depleted the waters of the Tongue and Powder Rivers (Compl. ¶ 13);

(7) Wyoming's depletion of the waters of the Tongue and Powder Rivers has caused injury to Montana and its water users (Compl. ¶ 14);

(8) Wyoming has refused Montana's requests to limit its water use (Compl. ¶ 16).

For the purposes of Wyoming's Motion and in accordance with the above rules, the Court should assume that Wyoming has caused Montana injury by depleting the waters of the Tongue and Powder Rivers in the manner specified. The legal question the Court should address is whether these actions violate Article V of the Yellowstone River Compact. Montana's Bill of Complaint "should not be dismissed for failure to state a claim unless it appears beyond doubt that [Montana] can prove no set of facts in

support of [its] claim which would entitle [it] to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); see also, *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969) (Court must construe the Complaint in favor of the Plaintiff).

2. The Court's Standards for Compact Interpretation

This Court has declared in unequivocal terms that it will enforce rights under an interstate river compact:

> "There is no doubt that this Court's jurisdiction to resolve controversies between two States extends to a properly framed suit to apportion the waters of an interstate stream between states through which it flows or to a suit to enforce a prior apportionment. It also extends to a suit by one State to enforce its compact with another State or to declare rights under a compact." *Texas v. New Mexico*, 462 U.S. 554, 567 (1983) (citations omitted); see also, e.g., *New Jersey v. Delaware*, 552 U.S. ___, 128 S. Ct. 1410 (2008).

In this case, Montana alleges breach of an interstate water compact approved by Congress. See, e.g., Compl. ¶ 18 ("The State of Montana has no sufficient remedy for the aforementioned violations of the Yellowstone River Compact by the State of Wyoming except by invoking the Court's original jurisdiction in this proceeding"). The Compact is both a contract and a federal statute. As a result, the customary rules of

contract interpretation and statutory construction apply. *New Jersey v. Delaware*, 552 U.S. ___, 128 S. Ct. 1410, 1420 (2008) (citing *New Jersey v. New York*, 523 U.S. 767, 811 (1998); *Kansas v. Colorado*, 533 U.S. 1, 20-21 (2000) (O'Connor, J., concurring in part, dissenting in part). If the text of the Compact is unambiguous, it is conclusive. See, e.g., *New Jersey v. New York*, 523 U.S. at 811; *Kansas v. Colorado*, 514 U.S. 673, 690 (1995). If the language of the Compact is ambiguous, other *reliable* indications of the parties' intent are taken into account. See generally, *Oklahoma v. New Mexico*, 501 U.S. 221, 236 n.6 (1991) (refusing to give weight to unreliable correspondence). Those sources include materials submitted to Congress in support of its congressional approval, and items in the public record susceptible to judicial notice such as the minutes of the Compact negotiations. See *Oklahoma v. New Mexico*, 501 U.S. at 235 n.5.

A compact represents a bargained-for exchange between its signatories and "remains a legal document that must be construed and applied in accordance with its terms." *Texas v. New Mexico*, 482 U.S. 124, 128 (1987). It is a fundamental principle of contract law that the parties to a contract are deemed to have contracted with reference to principles of law, including common law, existing at the time the contract was made. *Kansas v. Colorado*, 533 U.S. at 20. As the Court observed recently in *New Jersey v. Delaware*:

> "Interstate compacts, like treaties, are presumed to be 'the subject to careful consideration before they are entered into, and are drawn by persons competent to express their meaning, and to choose apt words in which to embody the purpose of the high contracting parties.'" 552 U.S. ___, 128 S. Ct. at 1423, quoting *Rocca v. Thompson*, 223 U.S. 317, 332 (1912).

In interpreting the Compact, the Court should attempt to give effect to every clause and every word in accordance with the rules of statutory construction. *New Jersey v. Delaware*, 552 U.S. ___, 128 S. Ct. at 1420-21; *Duncan v. Walker*, 533 U.S. 167, 174 (2001). To this end, it is appropriate to construe a compact term in accordance with its common-law meaning, unless some other meaning is intended. *New Jersey v. Delaware*, 552 U.S. ___, 128 S. Ct. at 1420. Absent a statutory text or structure that would require the Court to depart from the normal rules of statutory construction, the Court should not construe a statute in a manner that is strained and, at the same time, would render a term superfluous. *Dole Food Co. v. Patrickson*, 538 U.S. 468, 476-77 (2003); *United States v. Menasche*, 348 U.S. 528, 538-39 (1955).

3. Wyoming Has Not Met Its Burden Under Rule 12(b)(6).

The purpose of a Rule 12(b)(6) motion to dismiss is to streamline a case and allow a court to rule prior to the development of the facts when the Complaint

presents a discrete legal issue. See *Neitzke*, 490 U.S. at 326. To succeed on its Motion, Wyoming must establish "beyond doubt that [Montana] can prove no set of facts in support of [its] claim which would entitle [it] to relief." *Conley v. Gibson*, 355 U.S. at 45-46. As a threshold matter, Wyoming has not met this burden and its Motion to Dismiss should be denied for three reasons: (1) Montana's Complaint does not restrict its claims to Article V.A of the Compact; (2) Wyoming's interpretation of the Compact is incorrect; and (3) Wyoming relies on documents and facts beyond the scope of a Rule 12(b)(6) motion.

(a) Montana States a Claim Under Wyoming's Interpretation of the Compact.

Wyoming concedes that it violates the Compact "if its cumulative post-1950 diversions and nets gains in storage exceed Wyoming's percentage of cumulative divertible flow from October 1 through a given date." Wyo. Br. 37; see also, *id.* at 48 (acknowledging that Wyoming "would be in violation if its cumulative diversions and storage through the given date exceeded its 40% of the cumulative divertible flows on the Tongue, or 42% on the Powder"). Wyoming incorrectly asserts, however, that Montana "does not allege such a violation." *Id.* at 37.

It is central to Montana's Complaint that Wyoming has violated Article V.A of the Compact by using post-Compact water in derogation of Montana's

protected pre-Compact rights, but Montana has also broadly pled violations under Article V generally. Montana has pled the matter broadly because the amendment of pleadings in original actions "does not suit cases within the Court's original jurisdiction." See *Nebraska v. Wyoming*, 515 U.S. 1, 8 (1995). Because factual development has not yet occurred in this case, and because in any complete equitable apportionment, a violation of the apportioned supply of one category (pre-Compact rights) necessarily causes a violation of the allotment of post-Compact supply. For that reason, the Complaint does not single out Article V.A or V.B, and instead focuses on Montana's claims for violations of the apportionment in Article V.

Paragraphs 9 through 14 of the Complaint allege that Wyoming depleted the waters allocated to the State of Montana by allowing new and expanded water storage facilities, new acreage to be put under irrigation, expansion of groundwater pumping and increased consumption of water. By Wyoming's own admission, if such actions caused Wyoming's cumulative diversions and storage to exceed its percentage allocations on the Tongue or Powder River, such actions would constitute a violation of Article V of the Compact. Wyo. Br. 48. Because in a 12(b)(6) motion, the Court will assume these allegations to be true, it necessarily follows that the Complaint states a claim upon which relief may be granted, and Wyoming cannot meet its burden on a 12(b)(6) motion.

(b) Wyoming's Interpretation of the Compact Is Incorrect.

Montana seeks a declaration of its rights to the waters of the Tongue and Powder Rivers under the Compact, alleging that Wyoming's actions have depleted the water supply in violation of Montana's rights under Article V. Compl. at 5, ¶ A. Wyoming asserts that these allegations, even if true, do not constitute Compact violations. Wyo. Br. 39. Wyoming's motion thus places before this Court a discrete and controlling question of law that has precipitated this original action. Montana would welcome a resolution of this question of law through the familiar principles of compact construction and pursuant to Rule 12(b)(6). As discussed in detail in Sections III.B.1 to III.B.6 of this brief, Wyoming's Motion to Dismiss should be denied because its interpretation of the Compact is incorrect. See Fed. R. Civ. P. 12(b)(6); Sup. Ct. R. 17.2.

(c) Wyoming Relies on Documents and Facts Beyond the Scope of Rule 12(b)(6).

Wyoming's Motion to Dismiss should also be denied because it improperly relies on documents and alleged facts that are beyond the scope of a Rule 12(b)(6) motion.

Judicial notice of historical documents and public records is proper on a motion to dismiss, but only if those documents are unquestionably reliable. See

Papasan v. Allain, 478 U.S. 265, 268 n.1 (1986) (court may take notice of items in the public record that are not disputed by the parties); accord, Fed. R. Evid. 201 (judicial notice may be taken for facts "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned"). Documents contained in Wyoming's Motion to Dismiss do not rise to this unassailable level because they lack a date (Wyo. Br. App. 52-54), lack an identified author (Wyo. Br. App. 40, 58), provide only excerpted portions from a much larger document, (Wyo. Br. App. 7, 9, 12, 16, 20, 21, 22, 26, 28, 31, 33, 34, 37, 40, 41, 45, 47, 58, 49, 65, 66, 69, 75, 87, 88, 90, 91, 93, 94) or are otherwise unverifiable. The documents underscore Wyoming's reliance on disputed factual allegations outside the Complaint.

For example, at various points in its Motion, Wyoming relies on correspondence, post-Compact dealings, or assertions concerning the Compact negotiator's understanding and intent. Thus, rather than present a discrete legal issue as required by Rule 12(b)(6), Wyoming's Motion presents a mixed question of law and fact. If such a motion were presented before a Federal District Court pursuant to the Federal Rules of Civil Procedure, it would be converted to a motion for summary judgment. See Fed. R. Civ. P. 12(b); e.g., *Roberts v. Morton*, 389 F. Supp. 87 (D.C. Colo. 1975), *aff'd*, 549 F.2d 158 (10th Cir. 1976) (motion to dismiss converted to motion for summary judgment where administrative record compiled by Board of Land Appeals of Department of

Interior was relied upon by movant); *Thompson v. Dugan*, 427 F. Supp. 342 (Dist. Pa. 1977) (motion to dismiss converted to motion for summary judgment where movant relied upon certified copies of correspondence with the United States Department of Treasury); 2 A.L.R. Fed. 1027 (citing cases).

In original cases, this Court retains "ultimate responsibility" for both findings of fact and conclusions of law, and it fulfills this obligation with an eye to the long-lasting historical, geographical, and financial ramifications of its decisions. See *United States v. Maine*, 475 U.S. 89, 87 (1986); *Colorado v. New Mexico*, 467 U.S. 310, 317 (1984); *Mississippi v. Arkansas*, 415 U.S. 289, 294 (1974). In such cases, the Court has ruled on dispositive motions at an initial stage of litigation only in rare instances where it is apparent that there are no factual disputes. See, e.g., *United States v. Alaska*, 501 U.S. 1248 (1991) (permitting legal issue in original action to be brief based on stipulated facts). In contrast, the Court has taken a cautious approach toward critical public issues where the facts are not clear or are in dispute. As the court has explained:

> [S]ummary procedures, however salutary where issues are clear-cut and simple, present a treacherous record for deciding issues of far-flung import, on which this Court should draw inferences with caution from complicated legislation, contracting and practice.

Kennedy v. Silas Mason Co., 334 U.S. 249, 256-57 (1948); see also, *Eccles v. Peoples Bank*, 333 U.S. 426, 434 (1948) ("Judgments on issues of public moment based on such evidence (affidavits), not subject to probing by judges and opposing counsel, is apt to be treacherous. Caution is appropriate against the subtle tendency to decide public issues free from the safeguards of critical scrutiny of the facts, through use of a declaratory summary judgment.").

Where facts are at issue, it has long been recognized that the Court "in original actions, passing as it does on controversies between sovereigns which involve issues of high public importance, has always been liberal in allowing full development of the facts." *United States v. Texas*, 339 U.S. 707, 715 (1950) (citing cases); see also, *Kansas v. Colorado*, 185 U.S. 125, 147 (1902) ("The general rule is that the truth of material and relevant matters set forth with requisite precision are admitted by demurrer, but in a case of this magnitude, involving questions of so grave and far-reaching importance, it does not seem wise to apply that rule, and we must decline to do so."); *Nebraska v. Wyoming*, 515 U.S. 1, 13 (1995); *United States v. Wyoming*, 331 U.S. 440 (1947); *United States v. Oregon*, 295 U.S. 1 (1935); *United States v. Utah*, 283 U.S. 64 (1931); *Iowa v. Illinois*, 151 U.S. 238, 242 (1894); *Rhode Island v. Massachusetts*, 39 U.S. 210, 257 (1840).

In short, Montana believes that a decision on the discrete legal issue before the Court would advance the litigation. As constructed, however, Wyoming's

Motion to Dismiss improperly relies on documents and factual allegations outside the pleadings. To the extent that Wyoming relies on such documents and disputed facts, its Motion should be denied as beyond the scope of a Rule 12(b)(6) motion and improper for resolution at this stage of the litigation.

B. The Yellowstone River Compact Provides a Cause of Action for Depletion of Waters Apportioned to a Downstream State.

1. The Compact Apportions All Waters of the Yellowstone River Not Expressly Excluded.

The Compact, in its opening language, articulates four motivations of the signatory States: (1) considerations of interstate comity; (2) the desire to remove all causes of present and future controversy; (3) the desire to provide for an equitable division and apportionment; and (4) to encourage beneficial development and use. (App. to Compl. at A-1).

To this end, the drafters set up a three-tiered system of apportionment in Article V: existing uses, supplemental uses, and new uses. Article V.A protects existing beneficial uses first and separately from the rights described in Article V.B clause one (supplemental uses) and V.B clause two (new uses). Article V.A recognizes "[a]ppropriative rights to the beneficial uses of the water of the Yellowstone River System existing in each signatory State as of January 1,

1950)," and declares that such rights "shall continue to be enjoyed in accordance with the laws governing the acquisition and use of water under the doctrine of appropriation." App. to Compl. at A-8. Beneficial uses are defined as "that use by which the water supply of a drainage basin is depleted when usefully employed by the activities of man." App. to Compl. at A-5. Article V.B then apportions the "unused and unappropriated waters" of the Interstate tributaries that are not specifically addressed in V.A. *Id.* at A-8, A-9.

Article V is by its own terms, all-inclusive. The only waters excluded from the definition of "Yellowstone River System," and thus from the apportionment provisions of Article V.A, are those in Yellowstone National Park. App. to Compl. at A-4.

Other specific exclusions for de minimis uses or specific methods of water application in other provisions of Article V demonstrate that the drafters understood precisely what was being apportioned and what was not. For example, the Little Bighorn River was excluded from the percentage allocations of Article V.B. *Id.* at A-9. Domestic uses and certain stockwater uses were excluded in Article V.E.1. *Id.* at A-11. Devices and facilities for the control and regulation of surface waters, such as spreader dams and terraces, were excluded in Article V.E.2. *Id.*

Apportioning and allocating the waters of the entire Yellowstone River and its tributaries, subject to the express exclusions, is consistent with the stated intention of the compacting States "to remove all

causes of present and future controversy." *Id.* at A-1. The apportionment and allocation of *all* such waters is also consistent with, and required by, the "desir[e] to provide for an equitable division and apportionment of such waters." *Id.* at A-2. To that end, the States "resolved to conclude a Compact as authorized" by Congress "for the attainment of these purposes." *Id.* at A-1, A-2.

Indeed, Wyoming acknowledges the motivating factor of an equitable apportionment when it states that Montana and Wyoming needed a compact "to establish a practical system to share the interstate tributaries of the Yellowstone in a manner they both considered equitable." Wyo. Br. 8. Contrary to its own admission of the Compact's intent, however, Wyoming narrowly construes Article V as allocating water for new uses only. In Wyoming's view, the only operative or enforceable provision of the Compact is the second clause of Article V.B, as if the water addressed in Article V.A were somehow excluded from the Compact altogether: "Since Montana has not claimed that Wyoming has allowed, or will allow, diverters with post-1950 water rights to exceed the cumulative annual measurements set by the Compact, it has failed to state a claim on which relief can be granted." *Id.* at 3.

Wyoming's argument is unpersuasive for several reasons. First and foremost, it ignores the express purpose of the Compact to effect a complete apportionment of the water in the entire Yellowstone River Basin – not simply to allocate on a percentage basis

the water of four interstate tributaries between Montana and Wyoming. Second, it violates the States' intent to remove "*all* causes of present and future controversy." (Emphasis added.) Indeed, the exclusion of existing uses would have *invited* controversy, not removed it.

Third, a troubling aspect of Wyoming's narrow view of the Compact is its position that Wyoming water users may continue to use pre-Compact rights, without regard to the Compact at all. According to Wyoming, a contrary position would improperly infringe on Wyoming users' continued enjoyment of their rights. Wyo. Br. at 43, 56. Effectively, Wyoming reads Article V to protect only the most upstream state, i.e., Wyoming. Surely, neither of the other downstream States would have acceded to such a lopsided interpretation.

This Court has never held that an interstate compact approved by the legislatures and governors of the respective States and by the Congress and President of the United States has failed to attain its stated purpose. Quite the contrary, the Court has instructed that a compact's purpose is not defeated even when assigned duties are not carried out. See *Green v. Biddle*, 8 Wheat. (14 U.S.) 1, 91 (1823) (construction by which purposes of the Compact would be defeated by refusal to appoint commissioners "is too monstrous to be for a moment entertained. The best feelings of our nature revolt against a construction which leads to it."); see also, *Texas v. New Mexico*, in which New Mexico (the upstream state)

unsuccessfully argued that the Pecos River Compact was unenforceable. *Texas v. New Mexico*, 462 U.S. 554, 566-72 and n.17 (1983), citing *Biddle* (rejecting New Mexico's argument that this Court's role was limited to judicial review of official compact commission actions, which New Mexico could prevent from occurring with its veto power on the commission). By the same reasoning, the expressed intentions of the drafters of the Yellowstone River Compact should be enforced.

Wyoming argues that if the drafters had intended to allow a signatory State to make a state line call, they would have included provisions for a state line measuring device. Wyo. Br. 42. The Senate Report indicates Congress did intend a state line call to be the appropriate remedy for excessive depletions by an upstream State. Sen. Rep. App. A at 3a. The drafters also assumed that with the additional storage, no state line call would likely be necessary. (Sen. Rep. App. A at 15a.) The points of measurement for the allocations of unused and unappropriated waters for new uses of Article V.B, ¶¶ 1-4 are at the tributaries' mouth, however, because these measurements took into account not only diverted flow but also return flows and reuses throughout the Basin.

2. Article V.A Apportions the Water Supply in Use at the Time of the Compact.

By apportioning *all* waters of the Yellowstone River and its tributaries, the drafters necessarily

included the water supply in use at the time the Compact was adopted, thus allowing unused water to be stored or otherwise put to beneficial use. The Senate Committee that recommended approval of the Compact listed Article V.A first among the "apportionment" provisions and described that apportionment as follows:

> V-A. Existing appropriative rights as of January 1, 1950, are recognized in each of the signatory States. No regulation of the supply is mentioned for the satisfaction of those rights, and it is clear, then, that a demand of one State upon another for a supply different from that now obtaining under present conditions of supply and diversion, is not contemplated, nor would such a demand have legal standing. Sen. Rep. App. A at 3a.

As the Senate Committee viewed the Compact, Article V.A apportioned the waters of the basin by recognizing existing appropriative rights in each of the States. Thus, the entire water supply in use at the time of the adoption of the Compact was not excluded from the apportionment effected by the Compact, but, rather, existing uses of the basin water supply were recognized, and protected from "a demand of one State upon another for a supply different from that now obtaining under present conditions of supply and diversion." Sen. Rep. App. A. at 3a.

Wyoming appears to take the opposite view when it states: "Under most compacts, whether based on depletion or divertible flow, water rights established

in each State before the compact is completed are excluded from the allocation. As will be explained below, this is true of the Yellowstone River Compact." Wyo. Br. 11 (citation omitted). In support of its assertion, Wyoming cites JEROME C. MUYS, INTERSTATE WATER COMPACTS. THE INTERSTATE COMPACT AND FEDERAL-INTERSTATE COMPACT 12 and n.22 (National Water Comm'n 1971) [hereinafter Muys Treatise]. This treatise, however, does not support Wyoming's statement. The Muys Treatise, after discussing various methods of apportionment, states: "Whatever the allocation formula, existing uses and/or rights are usually protected." *Id.* at 12.

The fact that the drafters did not quantify existing rights does not mean they are outside the protection of the Compact. As the compact history shows, there are practical reasons why the States and Congress resorted simply to a recognition and protection of existing beneficial uses at the time of the Compact as a matter of principle, as opposed to trying to agree to the specific water rights then in use in each State. In describing Article V.A of the Yellowstone Compact, R.J. Newell, the Federal Representative, in his report to Congress, articulated the reasons for simply affirming in the Compact a *de facto* apportionment of interstate waters among existing uses at the time of the Compact:

> In earlier attempts to arrive at a compact and in the early meetings here reported, there was searching discussion as to whether the agreement sought on divisions of waters

> should include the water now appropriated and in use or should apply only to the unappropriated and unused balance which is available for further development. The latter principle was decided on (art. V-A) for several reasons. First, it would be a huge and time-consuming task to determine and fix comparable values for existing rights in three States with differing water laws and practices in establishing water rights. Second, the basic fact that there is enough water if properly conserved by storage to take care of all existing and all feasible future developments points up the importance of arriving promptly at the simplest workable agreement that would permit such storage projects to proceed. Sen. Rep. App. A at 15a.

In other words, the States and the federal representative to the negotiators, were driven to produce the simplest workable agreement at the earliest possible date to be in a position to take advantage of possible federal projects for improvement of the water supply in the basin, some of which were under consideration as part of the Pick-Sloan Plan. (House Rep. App. B at 10b.) Further, as Newell noted, it was largely the differing specifics of state appropriation law that prevented the parties from agreeing on a quantification of extant rights.[5] To assure that the parties could

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[5] All three States recognized the doctrine of appropriation generally, although each State had its own specific statutory provisions. See Wyo. Br. Opp. at App. A. North Dakota, for its part, also recognized historic riparian rights. See 1 WATERS AND

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come to a timely agreement and thus participate in the federal projects then under consideration, the Compact drafters chose to apportion and protect the existing uses, whatever they were at that time, and to move on to the allocation of the then-unused waters as accomplished in Article V.B.

This approach unburdened the parties from reconciling differing water laws, and based the protection on a snapshot of existing beneficial uses – not specific state water rights. Convinced that with the additional storage, the satisfaction of existing rights would be without controversy, they could avoid the quantification conundrum that had doomed the prior attempts, by protecting prior uses first, and without quantification.

Secretary of the Interior Oscar Chapman offered a similar explanation in a letter incorporated into the Senate Report:

> Extensive studies by an engineering committee, appointed by the commission to advise it, disclosed that little could be gained, from a water supply standpoint, by attempting, in the compact, the regulation and administration of existing appropriate rights in the signatory States. . . . Accordingly, paragraph A of article V recognizes the appropriative rights to the beneficial uses of the water of

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WATER RIGHTS § 8.02(c), at 8-38 (Robert E. Beck & Amy K. Kelley, eds. 2007).

> the Yellowstone River system existing in each signatory State as of January 1, 1950, and it permits the continued enjoyment of such rights in accordance with the laws governing the acquisition and use of water under the doctrine of appropriation. (Letter from Oscar Chapman, Secretary of the Interior, to Joseph O'Mahoney, Chairman, Committee on Interior and Insular Affairs, Sen. Rep. App. A at 27a).

Article V.A thus has profound significance, which Wyoming entirely ignores. Wyoming offers no explanation of how Article V.A fits into the overall apportionment, or what the drafters meant when they declared that existing rights to beneficial uses "shall continue to be enjoyed in accordance with the laws governing the acquisition and use of water under the doctrine of appropriation." It protects those rights under the "doctrine of appropriation," not under the particular laws of the State of Wyoming. As Newell reported, the parties' differing state water laws had largely stymied prior Compact drafts. It is not plausible that, given the differences between Montana's and Wyoming's application of prior appropriation law in their respective states, the drafters would have intended Article V.A to incorporate, *sub silencio*, specific Wyoming state law. And, it is not plausible that Montana would have agreed to such an instrument. See, e.g., *New Jersey v. Delaware*, 552 U.S. ___, 128 S. Ct. at 1422; *Texas v. New Mexico*, 462 U.S. at 570 ("It is difficult to conceive that Texas would trade away its right to seek equitable apportionment in

return for a promise that New Mexico could, for all practical purposes, avoid at will").

It is also important to note that the Compact is focused on preserving and protecting the existing *uses* in each State, as opposed to whatever permits or other paper filings might exist. Article V.A begins with a reference to use: "Appropriative rights to the beneficial uses . . . shall continue to be enjoyed." This focus on "use" is found also in the primary legislative history. The first sentence of the description by the Senate Committee on Interior and Insular Affairs regarding the purpose of the bill also references "use" of water: "The bill would give the consent of Congress to a compact entered into between the States of Montana, North Dakota, and Wyoming providing for an equitable division of the *use* of waters from the Yellowstone River and its tributaries." Sen. Rep. App. A at 2a (emphasis added).

The Senate Committee Report is headed: "Apportionment of *use* of water," and the first sentence of that section states: "The compact appears to be fair and equitable in apportioning the *use* of waters of the Yellowstone Basin, as defined." *Id.* (emphasis added). Throughout the Senate Committee Report, the word "use" appears numerous times. In discussing the comments of the Department of Justice, for instance, the Committee Report states: "Article V-B, it is true, allocates to the States the unused and unappropriated waters, but this follows V-A which recognizes all existing beneficial *uses* as of January 1, 1950." Sen. Rep. App. A at 5a. Thus, the Senate

understood that Article V.A recognizes all existing beneficial *uses*.

Federal representative R.J. Newell, in transmitting his report to the President of the Senate, stated: "I have the honor to enclose a conformed copy of a compact entered into on December 8, 1950, among the States of Montana, North Dakota, and Wyoming to determine the rights and obligations of those States respecting *uses* of the waters of the Yellowstone River and its tributaries." Sen. Rep. App. A at 8a (emphasis added). In the introductory section of his report, he stated, "I believe that the proposed compact is a sound basis for further development in the *use* and control of waters of the Yellowstone River. . . ." *Id.* at 9a. The noted examples of the "use" of water as being the basis of the apportionment in V.A is further supported by the many instances in which the word "use" appears through the Senate Report and the letters incorporated into that report. See Sen. Rep. App. A, passim, as well as the Compact itself, Article V.A.

The report of the House of Representatives Committee on Interior and Insular Affairs, reveals the same focus on the "use" of the waters apportioned by Article V.A and Article V in general. See, e.g., House Rep. App. B at 4b ("Accordingly, paragraph A of Article V recognizes the appropriative rights to the beneficial *uses* of the water of the Yellowstone River System existing in each signatory State as of January 1, 1950 and it permits the continued enjoyment of such rights in accordance with the laws governing the

acquisition and *use* of water under the doctrine of appropriation").

The consistent reference to "use" in the legislative history, and inclusion of that specific term in Article V.A negates any claim by Wyoming that the drafters intended something else, i.e., permitted rights or paper filings, to be protected thereby. (See App. C at 11c-12c. [1940 Yellowstone River Compact Comm'n Mins.].)

3. Article V.B Allocates the Water Supply Not in Use at the Time of the Compact.

The Yellowstone River Compact distinguishes between waters that were being used at the time of the Compact and those that were not. After protecting existing rights to beneficial uses of all water in Article V.A,[4] the drafters proceeded to address the remaining "unused and unappropriated waters of the Interstate tributaries in Article V.B. Within Article V.B, a further distinction is made. Clause 1 addresses supplemental supplies for rights described in Article V.A.[5]

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[4] An appropriative right is limited to the amount actually put to beneficial use rather than the amount claimed on a paper permit. See *Colorado v. New Mexico*, 467 U.S. 310, 323 (1984) (explaining that water rights under the prior appropriation doctrine "depend on actual use").

[5] Supplemental supplies are generally described as the additional water needed to provide a "full service" irrigation supply to acres previously receiving only "partial service," i.e.,

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Clause 2 addresses new uses. Federal Representative R.J. Newell described the priorities within V.B as follows: "[E]xisting irrigation developments with an inadequate supply should have a preferred right to the unused remainder over new projects. The final residue of supply was then divided between the States for further development." Sen. Rep. App. A at 15a; see also, App. to Compl. at A-8, A-9. Because the parties believed that additional storage would make the supply of existing rights easy, the parties characterized V.B as the "core" of the Compact. Sen. Rep. App. A at 27a.

A comprehensive methodology thus emerges from the structure of the Compact itself: pre-Compact rights in all three states take first priority. They are protected in whatever amount was then being put to beneficial use. Anything leftover after pre-1950 rights are satisfied may first be used for supplemental rights described in V.A, and the final remainder is divided by specific percentages for new uses. Wyoming ignores this comprehensive scheme when it asserts that the Compact governs only the remainder of the unused and unappropriated water subject to percentage allocation in V.B, clause 2. Wyoming does not explain how a "remainder" could ever be determined if, in fact, the drafters did not also intend the

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that quantity necessary to fully satisfy the beneficial use. (See generally Sen. Rep. App. A at 3a, noting that existing rights with "deficient" supplies are to be supplemented from V.B waters.)

Compact to establish a baseline of protected supply among the signatory States.

4. Article V.D Completes the Compact Apportionment.

Article V.D is the third apportionment clause of Article V. ("The apportionment or division of the waters of the basin is provided in Article V, subsections A, B and D.) Article V.D focuses on the allocation of remaining waters downstream near the Montana-North Dakota border. It provides: "All existing rights to the beneficial use of waters of the Yellowstone River in the States of Montana and North Dakota, below Intake, Montana, valid under the laws of these States as of January 1, 1950, are hereby recognized and shall be and remain unimpaired by this Compact." App. to Compl. at A-10. The House Committee described V.D, saying, *inter alia*, that "paragraph D recognizes all rights in the beneficial use of water than [sic] existed in Montana and North Dakota on January 1, 1950, and that divert below Intake, Mont." House Rep. App. B at 6b.

Article V.D reflects the fact that North Dakota was not solely a prior appropriation State, with respect to water rights, as were Wyoming and Montana. See 1 WATERS AND WATER RIGHTS § 8.02(c), at 8-38 (Robert E. Beck & Amy K. Kelley, eds. 2007) (riparian rights recognized in North Dakota). Since riparian rights are not required to be used in order to be maintained, different language was required in

Article V.D. While everything in Articles V.A and V.B, clause 1, turns on whether the water was used at the time of the Compact or not, riparian rights in North Dakota that may not have been in use at the time of the Compact were nevertheless to be recognized and protected unimpaired by the Compact. Article V.D thus achieved the same purpose of protecting existing rights below Intake, Montana, whether they were appropriative or riparian rights, as Article V.A did in other parts of the basin covered by the Compact.

All of the provisions of Article V are necessarily connected and, in accordance with the general rules of construction, must be given operative effect. *New Jersey v. Delaware*, 552 U.S. ___, 128 S.Ct. at 1420-21. This Court is obligated to construe the Compact as written. *Id.* Read in this way, Article V as a whole accomplishes what all three States intended: to avoid conflict, effect a complete apportionment, respect the rights of each State, and encourage future development. Wyoming's argument to the contrary should be rejected.

5. A State Cannot Lawfully Deplete Waters Apportioned to Another State.

As explained above, the Yellowstone River Compact apportions all of the waters of the Yellowstone River Basin not expressly excluded. Article V specifically recognizes and protects the pre-Compact rights in each State. The States are prohibited from depleting the apportioned pre-Compact water supply in two

ways under the Compact: First, in Article V.A by the directive that such rights "shall continue to be enjoyed;" and second, by the allocation in Article V.B of only the unused and unappropriated waters at the time of the Compact. If, as is claimed in the Bill of Complaint, Wyoming is depleting Montana's pre-Compact water supply by post-Compact uses, Wyoming is violating its allocation under Article V.B. The allocation under Article V.B to Wyoming is only from the waters "unused and unappropriated" at the time of the Compact. If Wyoming's post-Compact uses impair Montana's pre-Compact water supply, Wyoming is exceeding its allocation in V.B and is thereby violating Article V.B.

What are pre-Compact uses protected from? The Senate Committee provides an explicit answer: "It is clear, then, that a demand of one State upon another for a supply different from that now obtaining under present conditions of supply and diversion, is not contemplated, nor would such a demand have legal standing." Sen. Rep. App. A at 3a. That is, no State may deplete the water supply apportioned to another on the Interstate tributaries. In other words, Montana is not entitled under Article V.A to call upon Wyoming for more water than Montana was using pre-Compact, thus depriving Wyoming's water users of water that they were using to supply their appropriative water rights at the time of the Compact. By the same token, Wyoming and its water users cannot deplete the flows that were being used to supply existing water rights in Montana at the time of the

Compact. That is, Wyoming may not deplete the waters necessary to supply Montana's pre-Compact rights if that water was available to Montana under the state of development existing at the time of the Compact.

The Compact recognizes that the beneficial uses existing at the time of the Compact that are protected by Article V.A involve depletion of the water supply. Article II.H provides: "The term 'Beneficial Use' is herein defined to be that use by which the water supply of a drainage basin is *depleted* when usefully employed by the activities of man." App. to Compl. at A-5 (emphasis added). Thus, the drafters of the Compact recognized the physical reality that the beneficial use of water, especially for the favored beneficial use of irrigation, necessarily involved depletion (consumption) of water in the process of beneficial use. Wyoming's argument that the Compact ignores depletions is contrary to the plain language of Article V.A. See also, Sen. Rep. App. A at 3a acknowledging that the Compact allocations of Article V.B account for return flows, which are the flip side of the consumption/depletion equation.

In sum, the Compact prohibits the consumption and depletion of waters by one State that are apportioned to another State under Article V. Wyoming cannot increase the consumptive use (depletions) associated with its diversions at the time of the Compact if it would decrease the flows on which Montana was depending for its uses at the time of the Compact, thus violating Article V.A. This is true no

matter what the cause of the depletion may be, whether it is new storage or some other new means of depleting the surface flows of the stream, such as groundwater pumping or intensification of consumption on existing acres. If given the opportunity, Montana will prove that such depletions have occurred.

6. The Drafters Utilized the Divertible Flow Principle Only for Measuring the Post-Compact Supply for New Uses.

The divertible flow principle articulated in relation to Article V.B has no bearing upon whether the Compact protects Montana from depletions by post-Compact uses in Wyoming. Taken in context, Newell's comments wholly support Montana's interpretation of the Compact. Divertible flow was only a method for measuring the Article V.B clause 2 allocation. The full Newell report, included in Appendix A, reveals that Wyoming's quoted language on divertible flow relates only to the V.B. clause 2 waters. In that report, Newell explained the Compact's apportionment provisions sequentially: first, the overarching Yellowstone River system apportionment for existing uses without quantification in Article V.A; second, the allocation of the unused and unappropriated waters of the Interstate tributaries for supplemental uses, and lastly, the percentage allocations of supply to be made available for new uses. This last portion only is what is measured by the divertible flow method. Sen. Rep. App. A at 16a.

Wyoming claims that the Compact is a "divertible flow" compact, such that "claims based on depletion or consumption must be dismissed." Wyo. Br. 3. In support, Wyoming cites the R.J. Newell report to Congress. Wyoming's redacted language fails to show, however, that the Newell description of the "divertible flow principle" refers only to Article V.B, ¶ 1-4. Sen. Rep. App. A at 16a. In other words, the percentage allocations of the interstate tributaries in Article V.B were based on percentages of divertible flows, as specifically set out in Article V.C.

As can be seen from Mr. Newell's statement, the "divertible flow" principle is simply a measuring tool. It did not change the theory of the Compact. It did not change the effect of the Compact. It did not change the fundamental principle that all of the waters of the Tongue and Powder Rivers were apportioned and allocated by the Compact and that overuse by one State of its allocation necessarily depletes the waters allocated to another State. Finally, it did not change the principle, established by the Court, that depletion of apportioned waters under an interstate river compact is grounds for a claim in this Court.

Wyoming's view of its right to deplete the supply to the detriment of Montana's pre-Compact beneficial uses writes out of the Compact the V.A protection of the beneficial uses in the signatory States. Montana's pre-1950 rights are thereby protected from any of Wyoming's increases in consumption that deny it the water on which the pre-Compact rights in Montana relied at the time of the Compact.

The drafters and Congress certainly understood and intended to affect the entire hydrology of the basin by adding additional storage facilities. The Engineering Committee had undertaken comprehensive studies of the basin, mapped existing irrigated acres, potential irrigation, good reservoir sites, and had factored the return flows from the new waters that would be added to the system into their overall water balance. See Sen. Rep. App. A at 14a. The O'Mahoney report to Congress notes: "Allocations, thereby, take into account *return flows and uses of them*, as well as original runoff." Sen. Rep. App. A at 3a (emphasis added). Wyoming's picture of a limited agreement intended for new uses only, which ignores depletions and consumption, is entirely contrary to historic evidence and the text of the Compact itself.

C. Wyoming's Post-Compact Increases in Storage in Reservoirs Enlarged or Constructed After January 1, 1950 *Can* Violate the Compact.

Wyoming asserts: "The Compact does not restrict the construction of reservoirs, but instead, encourages it in both States . . . construction of reservoirs is not a Compact violation." Wyo. Br. 50-51. Montana agrees with Wyoming that the Compact encourages storage. It is not the construction of post-Compact storage in Wyoming about which Montana complains, rather, it is the use of that storage capacity to deplete waters apportioned and allocated to Montana under the Compact. See Compl. ¶ 9 ("Since January 1, 1950,

Wyoming has allowed construction and *use* of new and expanded water storage facilities in the Tongue and Powder River Basins, *in violation of Montana's rights* under Article V of the Compact"); cf *Oklahoma v. New Mexico*, 501 U.S. 221, 228-31 (1991) (determining that the Canadian River Compact imposes a limitation on stored water, not physical reservoir capacity).

Wyoming's current argument[6] is, "Reservoir storage could only cause Wyoming to violate the Compact if it caused Wyoming to exceed its *total* cumulative percentage allocation as of a given date. Montana has not alleged that this has ever occurred, or is likely to occur." Wyo. Br. 52 (emphasis in the Wyo. Br.). Montana's claim is that use of post-Compact storage facilities in Wyoming on the Tongue and Powder Rivers is depleting waters that are apportioned to Montana by the Compact. This statement is accepted as true for purposes of considering the Motion to Dismiss. The allegation in paragraph 9 of the Bill of Complaint is broadly phrased in terms of a "violation of Montana's rights under Article V of the Compact," which includes both Article V.A and Article V.B.

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[6] In its Brief in Opposition to Montana's Bill of Complaint, Wyoming suggested that no Compact violation has occurred because "[t]hese reservoirs are located on tributaries to the Tongue and Powder, and not on the main stems of those rivers." (Wyo. Br. in Opp. at 21). Wyoming has apparently abandoned this argument.

Furthermore, Wyoming mistakenly presumes that Article V.B is the only operative Article in the Compact, such that no signatory State has any cause of action based on alleged depletions of water necessary to satisfy pre-Compact uses. This argument also fails because it ignores Wyoming's obligations under Article V.A of the Compact not to deplete Montana's pre-Compact water supply by means of post-Compact development in Wyoming. See ¶ III.B., infra.

D. Wyoming's Post-Compact Increases in Irrigated Acreage *Can* Violate the Compact.

Montana alleges in paragraph 10 of its Bill of Complaint, "Since January 1, 1950, Wyoming has allowed new acreage to be put under irrigation in the Tongue and Powder River Basins, in violation of Montana's rights under Article V of the Compact." Wyoming responds: "In order to successfully allege a Wyoming violation of the compact" in this regard, "Montana must allege a violation of the allocation formula in a particular instance. Montana fails to do so in its complaint." Wyo. Br. 54.

Wyoming's assertion is misguided in two respects. First, as the quotation of paragraph 10 of the Bill of Complaint above shows, Montana pled a violation of Article V by the development of new acreage in Wyoming. Second, any post-Compact use in Wyoming that consumes part of the water supply

for Montana's pre-Compact uses constitutes a violation of Article V.

Irrigation of new acreage will undoubtedly cause additional depletions to the Powder and Tongue Rivers. This is because irrigation is an inherently consumptive process. See, e.g., Fourth Report of the Special Master 53-79, *Kansas v. Colorado*, No. 105, Orig. (2003). In any event, it is assumed for purposes of ruling on the Motion to Dismiss that irrigation of post-Compact acreage in Wyoming is causing depletions of the Tongue and Powder Rivers, in derogation of Montana's protected rights under Article V.

This understanding of the effects of putting new acreage under irrigation was clearly shared by the drafters of the Compact. The term "Beneficial Use" is defined in the compact to be "that used by which the water supply of a drainage basin is *depleted* when usefully employed by the activities of man." App. to Compl. at A-5. Thus, it was the contemplation of the drafters of the Compact that irrigation water use would have the effect of depleting the water supply. As explained above, depleting the water supply in a way that deprives Montana of part of its allocated share under Article V of the Compact is a violation of the Compact, something that this Court has repeatedly declared that it will address.

E. Wyoming's Increased Consumption on Pre-Compact Irrigated Acreage Can Violate the Compact.

For purposes of the Motion, this Court should assume the truth of Montana's allegation that Wyoming has allowed the consumption of water on existing irrigated acreage in the Tongue and Powder River Basins to be increased and that the effect of that increase is to deplete the flows of the Tongue and Powder Rivers. (Compl. ¶ 12). This allows the Court to reach the legal question whether Wyoming's depletion of the water supply has the potential to violate the Compact. If that potential is found to exist, then Montana should be allowed to prove the facts supporting that claim. If the activity increases the consumption associated with a particular use, it necessarily decreases the return flows,[7] which, in turn, decreases the supply for downstream users. The amount of return flows, and therefore the water supply for the protected Compact rights in Montana are thus protected from being diminished by increased consumptive use in Wyoming. See Sen. Rep. App. A at 3a.

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[7] When surface water is diverted for irrigation purposes, some of that water is evaporated and some is transpired by the crops. The rest returns to the stream either by running over the land surface to the stream or by percolating down to the groundwater that discharges to the stream. See, e.g., 1 WATERS AND WATER RIGHTS §§ 2.01-2.05 (Robert E. Beck & Amy K. Kelley, eds. 2007), and sources cited therein.

Wyoming states: "Since this claim also relies on the rejected depletion principle, it must be dismissed." Wyo. Br. 55. But, as noted in Part III.B herein, the Compact Article V.A specifically incorporates "depletion" in the definition of beneficial use, and Article V.B incorporates return flows into the accounting. See Sen. Rep. App. A at 3a. The Compact and its drafters did not reject the principle that one State's allocation cannot be depleted by another State.

The fundamental principle, that one State may not deplete another's share of the water under the Compact, explains why Wyoming's second assertion must also fail. That assertion is, "In any case, the Compact does not address delivery methods and does not restrict Wyoming's consumption of water in order to guarantee deliveries to Montana at the state line." Wyo. Br. 56. Montana's claim, however, does not depend on whether specific delivery methods were specified in the Compact. Indeed, the Compact states general principles which this Court is called upon to implement in a way that carries out the intent of the general principles. In this case, the general principle is that waters apportioned to one State shall not be depleted by another State. The test is whether those waters have been depleted. If they have, then the method by which they have been depleted is of no consequence. Whatever method of depleting one State's allocation under the Compact by another State, such depletion constitutes a violation of the Compact.

Article V.A only protects those water rights in each state that were already fully perfected. Article V.B then provides for any increases in water consumption on existing acres and development of new uses from "unused and unappropriated waters." Wyoming's view that its users may increase consumption and depletion to the system by going from a partial supply to a full supply on the same acreage and increasing irrigation efficiency writes the supplemental clause out of V.B and diminishes the protection expressly granted in V.A. *New Jersey v. Delaware*, 552 U.S. ___, 128 S. Ct. at 1420-21. This is true because if Article V.A permits users to increase their consumption under a pre-Compact water right, then there is no logical way to understand purposes served by the supplemental rights language in Article V.B.

F. Montana *Has* Stated a Claim Regarding Wyoming's Groundwater Development.

Montana's claim for relief is not predicated on the notion that the Compact directly apportions groundwater, as a distinct resource, among the compacting States. Rather, the Court has previously observed that, "'groundwater and surface water are physically interrelated as integral parts of the hydrological cycle.'" *Cappaert v. United States*, 426 U.S. 128, 142 (1976) (quoting Charles E. Corker, *Groundwater Law, Management and Administration, National Water Commission Legal Study No. 6*, at xxiv (1971)). As a

result, pumping can and usually has an impact on surface flows in the same basin. See, e.g., Thomas C. Winter, et al., *Ground Water and Surface Water: A Single Resource* (United States Geological Survey Circular 1139 (1998); see also, First Report of Special Master (Subject: Nebraska's Motion to Dismiss, 2 n.3), *Kansas v. Nebraska & Colorado*, No. 126, Orig. (2000) ("Beyond being an assumed fact for the purpose of deciding this Motion, the hydraulic connection between stream flow and groundwater is a well established scientific fact"). [Hereinafter "Report of Special Master"] Special Master McKusick emphasized the longstanding awareness of the interconnection between groundwater and surface water in recommending to the Court that Nebraska's Motion to Dismiss in No. 126, Original, be denied (the Court denied the Motion to Dismiss. 530 U.S. 1272 (2000)):

> In addition, the scientific community well understood that hydraulic connection. *See*, C.F. Tolman & Amy C. Stipp, *Analysis of Legal Concepts of Subflow and Percolating Waters*, 21 Or. L. Rev. 113, 115-29 (1942) (reviewing the principles of interrelation between surface flow and groundwater and stating that '[t]he significance of the fact that ground water never occurs as a stationary water body should be stressed. Ordinarily, the subsurface reservoir is continuously receiving additions by influent seepage from rainfall and surface water bodies and is always discharging water by natural processes. In the subsurface reservoir ground water is percolating toward the discharge

> area; no static ground-water bodies are known to exist.'); Samuel C. Wiel, *Need of Unified Law for Surface and Underground Water*, 2 S. Cal. L. Rev. 358, 362 (1921) (pointing out that '[a]lthough varying greatly in degree, connection between surface streams and groundwater is usual, and in fact invariable'). Report of Special Master 24.

Based on these well-founded principles, Montana has alleged that post-Compact groundwater pumping in Wyoming has depleted Montana share of the "water supply" necessary to satisfy its pre-Compact uses. App. to Compl. at A-5, A-8. Montana asserts that the "water supply" of the Yellowstone River System depends on groundwater and that, if Wyoming intercepts those contributions through post-Compact groundwater pumping, changing the hydraulic gradient, or actively taking water from the stream, Wyoming deprives Montana of its allocated share.

According to the Wyoming Brief, "The Compact drafters made it clear in plain language throughout Article V that they intended the Compact to govern surface water, not groundwater." Wyo. Br. 59. Wyoming bases its argument on two propositions: (1) there is no mention of groundwater, and (2) the Yellowstone River Compact is not a "depletion" compact. Neither of these arguments have merit.

The first argument was rejected by this Court in *Kansas v. Nebraska and Colorado*, No. 126 Orig., involving the Republican River Compact. As with the

Yellowstone River Compact, the Republican River Compact made no mention of groundwater or wells. The groundwater question was referred to Special Master Vincent L. McKusick, who concluded:

> The Compact fully allocates the entire natural stream flow of the Basin undepleted by the activities of man. By the factual pleading of the Kansas Complaint, which the Court can assume to be true for the purpose of ruling on the Motion to Dismiss, groundwater pumping in Nebraska, obviously an activity of man, is depleting that stream flow because the pumped groundwater and the stream flow are hydraulically connected. To whatever extent groundwater pumping depletes the stream flow in the Basin, such depletion constitutes consumption of a part of the virgin water supply and must be accounted against the allocated share of the pumping State. The use of a State's allocation through groundwater pumping is permissible, but such pumping is subject to the restrictions imposed by the Compact allocations.
>
> In sum, I conclude that *the Compact restricts groundwater consumption to whatever extent it depletes stream flow* in the Republican River Basin. I therefore recommend that Nebraska's Motion to Dismiss be denied. *Id.* at 1-3 (footnote omitted) (emphasis added).

The Supreme Court denied the Motion to Dismiss, thereby rejecting the upstream States' arguments. See *Kansas v. Nebraska and Colorado*, 530 U.S. 1272 (2002).

Like the Yellowstone River Compact, the Republican River Compact made no specific reference to groundwater pumping or wells. See Report of Special Master at 22 ("Thus, the comprehensive definition of water supply, even without use of the express term 'groundwater,' requires a conclusion that, as a matter of law, a State can violate the Compact through excessive pumping of groundwater hydraulically connected to the Republican River and its tributaries.").

The logic applied by the Supreme Court to interstate river compact enforcement cases is that any depletion of the interstate river in one State, by groundwater pumping or otherwise, is to be counted as part of that State's use of its compact allocation. This was the holding of the Court even though groundwater was not mentioned in the Pecos River Compact. E.g., *Texas v. New Mexico*, 462 U.S. 554, 557 (1983) ("If development in New Mexico were not restricted, especially the groundwater pumping near Roswell, no water at all might reach Texas in many years"); see also, *Kansas v. Colorado*, 543 U.S. 86, 91 (2004) (groundwater pumping held to violate Arkansas River Compact).

Wyoming's second ground for its argument that the Yellowstone River Compact is not intended to govern groundwater is that this is a "depletion" compact: "Thus, Montana's groundwater allegation is based on its assertion that the Compact is a depletion compact." Wyo. Br. 63 (emphasis in the original). Wyoming again mistakes the measuring formula in Article V.C with whether the rights of the States to

their pre-Compact water supplies that are protected under Article V can be depleted by groundwater pumping. As explained in Section III.B.5 above, these are two totally different concepts used for totally different purposes.

In essence, Wyoming is arguing that, if its groundwater pumping were to dry up the flows going to Montana from Wyoming in the Tongue and Powder Rivers, Montana would have no remedy under the Yellowstone River Compact. This is contrary to the fundamental concept of an interstate water apportionment by compact.

G. The *Amicus* Brief Misunderstands Both the Court's Precedents and Montana's Claim in This Case.

Anadarko incorrectly concludes that the Yellowstone River Compact is not a complete apportionment, citing differences in language between the Yellowstone River Compact and the Republican River Compact. Anadarko Br. at 10.

Like the Republican River Compact, the Yellowstone River Compact apportionment broadly applies to "waters of the Yellowstone River and its tributaries, other than waters within or waters which contribute to the flow of streams within the Yellowstone National Park." App. to Compl. at A-1. Article V.A of the Yellowstone River Compact protects "beneficial uses," defined as "that use by which the water supply of a drainage basin is depleted when usefully employed by

the activities of man." App. to Compl. at A-5; (*compare* Republican River Compact, 57 Stat. 86-87 (1943) (defining "virgin water supply" as water "undepleted by the activities of man"). Article V.A applies to the Yellowstone River system, defined as the "Yellowstone River and all of its tributaries, including springs and swamps, from their sources to the mouth . . . except those portions thereof which are within or contribute to the flow of streams within Yellowstone National Park. Article II.D App. to Compl. at A-5. Any groundwater use, removal, or pumping in Wyoming is an "activity of man" by which the water supply of the basin is depleted. As in the Republican River Compact, Article V.A protects Montana's beneficial uses from post-Compact groundwater pumping or other "activities of man" in Wyoming that deplete the basin to the extent that Montana is deprived of the "water supply" necessary to satisfy its pre-Compact uses. See Report of Special Master at 22 (interception of stream sources by groundwater pumping can violate compact).

Anadarko makes two additional arguments that bear noting. First, it argues that the definition of "Divert" and "Diversion" indicate that the Compact was not intended to address groundwater. Anadarko Br. at 7-10. "Divert" and "Diversion" are defined by the Compact to mean "the taking or removing of water from the Yellowstone River or any tributary thereof when the water so taken or removed is not returned directly into the channel of the Yellowstone River or of the tributary from which it is taken." Article II.G. Anadarko mistakenly construes this provision to

mean "taking water from the channel," which it understands to exclude groundwater. Anadarko Br. at 15 n.8. This Court has recognized, however, that the term "diversion" is broad enough to encompass both surface and groundwater. *Cappaert*, 426 U.S. at 143 ("we hold that the United States can protect its water from subsequent diversions, whether the diversion is of surface or groundwater"). Basic principles of hydrology have long recognized that water may be removed from a river such as the Yellowstone River or tributary thereof by groundwater pumping. Moreover, the term "diversion" does not appear in Article V.A, and the fact a "diversion" does not occur where water is removed from the Yellowstone River or tributary, but returned to the channel as return flow reinforces the notion that the Compact is concerned with protecting water supply to Montana.

Second, Anadarko argues that the Compact does not address groundwater that would not naturally reach the surface so as to affect river flow in Montana. Anadarko Br. at 13-16. Montana generally agrees that the Compact does not address groundwater that does not affect water supply in Montana. However, the determination of whether groundwater does or does not affect water supply in Montana is a factual determination that is not before the Court on Wyoming's Motion to Dismiss.

IV. CONCLUSION

Wyoming's Motion to Dismiss should be denied.

Respectfully submitted,

MIKE MCGRATH
Attorney General of Montana
CHRISTIAN D. TWEETEN
Chief Civil Counsel
SARAH A. BOND*
JENNIFER ANDERS
Assistant Attorneys General
State of Montana
Justice Building, 215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401
(406) 444-2026

JOHN B. DRAPER
JEFFREY J. WECHSLER
Special Assistant Attorneys General
MONTGOMERY & ANDREWS, P.A.
P.O. Box 2307
Santa Fe, NM 87504-2307

Counsel of Record

May 2008

APPENDIX A

Calendar No. 837

82D CONGRESS)	SENATE	(REPORT
1st Session)		(No. 883

GRANTING THE CONSENT OF CONGRESS TO A COMPACT ENTERED INTO BY THE STATES OF MONTANA, NORTH DAKOTA, AND WYOMING RELATING TO THE WATERS OF THE YELLOWSTONE RIVER

OCTOBER 2 (legislative day, OCTOBER 1), 1951. – Ordered to be printed

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Mr. O'MAHONEY, from the Committee on Interior and Insular Affairs, submitted the following

REPORT

[To accompany S. 1311]

The Committee on Interior and Insular Affairs, to whom was referred the bill (S. 1311) granting the consent of Congress to a compact entered into by the States of Montana, North Dakota, and Wyoming relating to the waters of the Yellowstone River, having considered the same report favorably thereon without amendment and with the recommendation that the bill do pass.

THE PURPOSE OF THE BILL

The bill would give the consent of Congress to a compact entered into between the States of Montana, North Dakota, and Wyoming providing for an equitable division of the use of waters from the Yellowstone River and its tributaries. Public Law 83, Eighty-first Congress, approved June 2, 1949, gave the consent of Congress to negotiate and enter into a compact, provided for the appointment of a Federal representative to represent the United States in the negotiations and to report thereon to the Congress. The compact was agreed to by the several representatives of the affected States at Billings, Mont., on December 8, 1950, and the States ratified the compact early in 1951.

APPORTIONMENT OF USE OF WATER

The compact appears to be fair and equitable in apportioning the use of waters of the Yellowstone Basin, as defined. The compact provisions are easily administered, and require no elaborate organization. In all respects, it presents an unusually practicable solution to the problems which, during the early years of negotiations, seemed highly complicated and difficult.

The Yellowstone River Basin and the Yellowstone River system (i.e., the river and its tributaries) are, for the purposes of the compact, exclusive of the Yellowstone National Park area and its waters, and the waters of the Little Bighorn River.

The apportionment, or division, of the waters of the basin is provided in article V, subsections A, B, and D, as follows:

V-A. Existing appropriative rights as of January 1, 1950, are recognized in each of the signatory States. No regulation of the supply is mentioned for the satisfaction of those rights, and it is clear, then, that a demand of one State upon another for a supply different from that now obtaining under present conditions of supply and diversion, is not contemplated, nor would such a demand have legal standing. Where these rights have deficient supplies they would be supplemented by rights obtained from "unused and unappropriated waters" in the basin as of January 1, 1950, from the allocated waters under subsection B. North Dakota rights are covered specifically in subsection D.

V-B. Unused and unappropriated waters as of January 1, 1950, of the four interstate tributaries, the Clarks Fork of the Yellowstone, the Big Horn, Tongue, and Powder Rivers, all of which rise in Wyoming and join the main stem of the Yellowstone River in Montana, are allocated in variable percentages between Montana and Wyoming. The definition of these waters is found in subsection C of article V. The allocations (by the method of computation of the waters not appropriated and used as of January 1, 1950) are percentages of divertible and storable waters in each tributary basin during any water year or at any time in the water year after its beginning (October 1). Allocations, thereby, take into account return flows and uses of them, as well as original runoff. This results from the computation directive which says, in effect, that allocated flows are the sum

of diversions and outflows from the tributary basin corrected for changes in the storage of such waters.

V-D. Below Intake, Mont., the flows in the Yellowstone River are apportioned between Montana and North Dakota on the basis of acreages irrigated in each State. Tributary streams below Intake are allotted to the States in which they are situated.

The use of the waters of the Yellowstone River which flow from the Yellowstone National Park and accrue from Montana tributaries and general runoff in Montana is not affected by the compact, provided, that uses originating subsequent to January 1, 1950, do not deplete the flows below Intake to a point where older priorities are injured.

Subsection V-E provides that:

1. Existing and future domestic and stock-water uses of water: *Provided*, That the capacity of any reservoir for stock water * * * shall not exceed 20 acre-feet –

are excluded from the provisions of the compact. Thus, the States have agreed that domestic and stock-water uses shall be unrestricted, subject only to the limitation in capacity of a stock-water reservoir. This subsection is identical in its effect to like provisions of the Belle Fourche River compact.

COMMENTS OF BUREAU OF THE BUDGET AND DEPARTMENT OF THE INTERIOR

The report of the Bureau of the Budget of September 14, 1951, states that the Department of Justice believes that the compact does not adequately

preserve, protect, or recognize the interests, sovereignty or jurisdiction of the United States in the "area of waters" affected. Justice believes the term quoted above to be obscure and possibly conflicting; that the allocations between the States of "unused and unappropriated waters" may possibly deprive the United States of the use of surplus water it has anticipated would flow into the Missouri River; that the provisions that the commission (created by the compact to administer the compact) may sue and be sued might be construed to waive the sovereign immunity of the Federal Government from suit.

Justice recommends that the undesirable provisions be alleviated, or made impotent, by substituting a different form of consent to the compact, and such a form is included in its comments.

The committee has considered these objections and the recommendation. In article XVI(a), it seems clear that the "area of waters" can only refer to the places where Yellowstone River waters may be held or may be flowing, and that such sovereignty or jurisdiction as the United States may have over them is not impaired by the compact. The sentence containing the ambiguous term, "area of waters," continues to say that the compact does not impair or affect any rights or powers of the United States – in and to the use of the waters of the Yellowstone River Basin nor its capacity to acquire rights in and to the use of said waters.

Article V-B, it is true, allocates to the States the "unused and unappropriated waters," but this follows V-A which recognizes all existing beneficial uses as of January 1, 1950. As to these "unused and

unappropriated waters," the United States is not barred if their uses conform to the division between the States, as, for example, in developing a reclamation project in compliance with Federal and State water laws. Nothing new is involved here; only customary practices are contemplated by the affected States. If the Department of Justice has in mind new theories of Federal ownership of these waters respecting navigation, for example, this matter is settled by the O'Mahoney-Millikin amendment to the Flood Control Acts of 1944 and 1946. If the use of water for power is in question, the agreement of Federal agencies and the States upon the water supply studies of April 1951 is sufficient to indicate that it is the view of these agencies and the States that, as a practical matter, the provisions of the O'Mahoney-Millikin amendment will also apply to water use for power.

As to article III-G, relating to suits by or against the Commission in the Federal courts, the fears of Justice that the language might waive the sovereign immunity of the United States seem to have little basis. The Commission is created for specific purposes only. The powers of the Commission are limited to carrying out the provisions of the compact, namely, to require that the division of the waters among the affected States be in conformity with compact articles V to X, inclusive, and affect only Montana and Wyoming operations. The Federal member of the three-man Commission will represent the United States Geological Survey, an agency entrusted with the survey of the water resources of the basin. The Federal member may vote only when the Montana and Wyoming members fail to agree on the administration of

the terms of the compact. His action would bind the Commission, not the United States. The United States is not a party to the compact.

Public Law 83, Eighty-first Congress, approved June 2, 1949, gave the consent of Congress to the negotiation of the Yellowstone River compact:

upon condition that one suitable person, who shall be appointed by the President of the United States, shall participate in said negotiations as the representative of the United States and shall make a report to Congress of the proceedings and of any compact or agreement entered into * * *.

This provision does not make the United States a party to the compact.

The Federal representative, appointed pursuant to Public Law 83, was Mr. R. J. Newell, formerly regional director, Bureau of Reclamation, being stationed at Boise, Idaho, for many years. In his report, Mr. Newell says that when the negotiations began he received specific instructions from the President concerning the protection of the interests of the United States. He says these instructions were carefully and fully observed, and the compact meets his approval.

The report of the Secretary of the Interior of September 27, 1951, is favorable, and notes that the compact will enable the Federal Government and the States to expedite developments of works in upper portion of the Missouri River Basin which are presently authorized.

Following is the report of Mr. R. J. Newell, Federal representative, and reports of the Bureau of the

Budget and the Department of the Interior, all of which are presented in full:

BOISE, IDAHO, *March 16, 1951.*

Hon. ALBEN W. BARKLEY,
President of the Senate, Washington, D. C.

MY DEAR MR. PRESIDENT: I have the honor to enclose a conformed copy of a compact entered into on December 8, 1950, among the States of Montana, North Dakota, and Wyoming to determine the rights and obligations of those States respecting uses of the waters of the Yellowstone River and its tributaries.

By virtue of my appointment by the President as the representative of the United States, I participated in the negotiations which led to the compact. My report thereon is enclosed.

Sincerely yours,

R. J. NEWELL,
Representative of the United States,
Yellowstone River Compact Negotiations.

REPORT TO THE CONGRESS BY THE FEDERAL REPRESENTATIVE ON THE YELLOWSTONE RIVER COMPACT

By the act of June 2, 1949 (Public Law 83, 81st Cong.), Congress granted its consent to the States of Montana, North Dakota, and Wyoming to negotiate and enter into a compact or agreement for the division of the waters of the Yellowstone River excepting waters within or tributary to the Yellowstone National Park.

Commissioners representing these States, after negotiations extending over a year, have reached final

agreement on the provisions of the proposed compact at a meeting held in Billings, Mont., on December 7 and 8, 1950, and each one of them has affixed his signature thereto. The State Legislature of Wyoming ratified the agreement by an act signed by the Governor on January 27, 1951, Montana's Legislature likewise approved and the Governor signed on February 13, 1951, and North Dakota's Legislature approved and the Governor signed on March 7, 1951.

The authorizing act required that a Federal representative be appointed to participate in the negotiations and to report to the Congress on the proceedings and on any compact or agreement entered into. Accordingly, the President, on October 19, 1949, appointed me as such Federal representative, and I have participated in the negotiations of the commissioners and hereby report as directed.

I believe that the proposed compact is a sound basis for further development in the use and control of waters of the Yellowstone River for multiple purposes, especially for irrigation, that the division of the waters among the States as agreed on is equitable, and that the rights of the United States are properly protected, and, therefore, I recommend that the consent of Congress be given the proposed compact, a copy of which is attached.

Further report follows:

Previous Negotiations

Three previous compacts have been negotiated on the Yellowstone River. The first of these was signed in February 1935. It concerned only the States of Montana and Wyoming, and was never acted upon by the

legislatures. The second compact was negotiated in 1942 and went to the legislatures in 1943. This concerned the three States – Montana, Wyoming, and North Dakota. The Wyoming Legislature was the first to take action on this compact and failed to ratify it. A third compact, quite similar in form to the previous compact, was negotiated in 1944, and reached the Legislatures of Montana, Wyoming, and North Dakota in 1945. This compact was ratified by North Dakota, Montana, and by the Legislature in Wyoming, but was vetoed by the Governor of Wyoming. The present compact is therefore the fourth that has been negotiated by Montana and Wyoming, and the third to concern all three States.

Area Involved

The drainage basin of the Yellowstone River, from its source in the highlands of the Rocky Mountains extending downstream through north central Wyoming and southeastern Montana to its mouth a few miles below the Montana-North Dakota line, is involved in the proposed compact.

The area drained comprises over 70,000 square miles, of which roughly 1,500,000 acres are being irrigated. The irrigated land is almost equally divided between Montana and Wyoming with less than 2 percent in North Dakota. Investigations indicate that suitable land is at hand feasible to irrigate and available water supply is adequate, if conserved, to increase the irrigated area by about 34 percent. The increased area is also about equally divided between Montana and Wyoming with a minor acreage in North Dakota.

Purposes

The major purposes of the proposed compact, as stated therein, are to promote interstate comity, to remove causes of present and future controversy between the States with respect to the waters of the Yellowstone River and its tributaries, to provide for an equitable division and apportionment of such waters and to encourage the beneficial development and use thereof. Installation of physical works needed to foster that use has been delayed pending an agreement between division of waters.

State Commissioners

The following commissioners were appointed by the respective governors represent their States in the negotiation of the proposed compact:

For Montana	For Wyoming	For North Dakota
Fred E. Buck	L. C. Bishop[3]	
A. W. Bradshaw	Earl T. Bower	I. A. Acker
H. W. Bunston	J. Harold Cash	Einar H. Dahl
John Herzog	Ben F. Cochrane	J. J. Walsh
John M. Jarussi	Ernest J. Goppert	
Ashton Jones	Richard L. Greene	
Chris. Josephson	E. C. Gwillim	
A. Wallace Kingsbury	E. J. Johnson	
	Lee E. Keith	
P. F. Leonard	N. V. Kurtz	
Walter M. McLaughlin	Harry L. Littlefield	
Dave M. Manning	R. E. McNally	

Joseph Muggli	Will G. Metz
Chester E. Onstad	Mark N. Partridge
Ed F. Parriott	Fred V. Portz[4]
Axel Persson[1]	Alonzo R. Shreve
R R. Renne[2]	Charles M. Smith
Keith M. Trout	Leonard F. Thornton
	M. B. Walker

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[1] Resigned.

[2] Appointed just prior to final meeting.

[3] Represented at formal meetings by Deputy Earl Lloyd.

[4] Died.

The State engineer was included in each State group as that officer bears important responsibilities in connection with the administration of the State's water supplies. However, these responsibilities vary from State to State. Consultants and advisors assisted in the negotiations.

Federal Contribution

The office of region 6 of the Bureau of Reclamation furnished a legal advisor and a secretary and took care of all recording, duplicating, correspondence and the like. The Bureau also contributed a great amount of data on land surveys, water records, etc. The Bureau of Indian Affairs, through the area engineer at Billings, also furnished similar data

concerning the large area of Indian lands in the basin.

NEGOTIATIONS

Four formal meetings of the full commission, all at Billings, Mont., were held on the following dates: November 29, 1949; February 1 and 2, 1950; October 24 and 25, 1950; December 7 and 8, 1950.

Minutes of these meetings were made and adopted officially by the commissioners. They have been assembled and labeled "Yellowstone River compact–Minutes of formal meetings of the Yellowstone River compact commissioners." They are not being sent out as part of the text of this report, but copies are being furnished for the official files of the appropriate committees of Congress and for the General Services Administration of the United States for filing with the original of the compact. Each of the meetings was well attended, though three were held in winter and the commissioners came from widely scattered points over a huge area. Meetings were open to the public and the press. Because of the size of the group, including 39 commissioners and a number of advisers, consultants, and other interested parties, much of the detail work of collecting and digesting information and drafting language had to be done in smaller committees. Informal meetings of representatives of interested Federal agencies were held on November 28, 1949, and February 2, 1950.

A drafting committee made up of attorneys from each of the three States held one meeting in August 1950, and attempted to draft language satisfactory to all parties.

However, most of the ground work was laid, most of the material gathered and most of the questions answered by an engineering committee made up of the State engineers of the three States, the area engineer of the Bureau of Indian Affairs, and the district engineer of the Bureau of Reclamation, Yellowstone district, and assisted on occasion by numerous others, from private, State and Federal ranks, who had information of value to offer. This committee held a number of meetings and made one field trip throughout the length of the Big Horn River (largest tributary of the Yellowstone) to check field data on the ground.

Main Features of the Compact

The compelling reason for the negotiation of a compact was the need for agreement on division of the waters of interstate tributaries in the Yellowstone River Basin that would allow further development to go forward. Because the main stem of the river is almost entirely in Montana and its water supply under any future program appears adequate for feasible developments along its course, it was given little consideration in the negotiations. While North Dakota's representatives contributed in an important measure to the work of the commission, the real interest of the State in the compact is minor on account of the very small part of the drainage basin that is within its borders. The waters in Yellowstone National Park and tributary thereto were expressly excluded by the language of the authorizing act. The real problem and the purpose of the undertaking was then to divide the waters of four principal tributaries,

the Clarks Fork, Big Horn, Tongue, and Powder, all rising in Wyoming and flowing across the State line into Montana, with developments, existing and proposed, in both States.

In earlier attempts to arrive at a compact and in the early meetings here reported, there was searching discussion as to whether the agreement sought on division of waters should include the water now appropriated and in use or should apply only to the unappropriated and unused balance which is available for further development. The latter principle was decided on (art. V-A) for several reasons. First, it would be a huge and time-consuming task to determine and fix comparable values for existing rights in three States with differing water laws and practices in establishing water rights. Second, the basic fact that there is enough water if properly conserved by storage to take care of all existing and all feasible future developments points up the importance of arriving promptly at the simplest workable agreement that would permit such storage projects to proceed. When these are built, even the operation provisions of the compact are expected to become easy of administration.

It is further agreed (art. V-B) that existing irrigation developments with an inadequate supply should have a preferred right to the unused remainder over new projects.

The final residue of supply was then divided between the States for further development. The basis for the division on each tributary was the acreage of land in each State that could be feasibly irrigated from that tributary, the requirements used to determine feasibility being the same in each State.

For supervision of the operation of the compact, a commission is provided for, made up of one member from each of the States of Montana and Wyoming, to be appointed by the respective Governors, and one member to be appointed by the Director of the Geological Survey. The State representatives on this operating commission could be the State engineers who are usually charged with the supervision of water right matters in irrigation States, in which case no new positions would be created. The Geological Survey was made responsible for the third member for the reason that traditionally its Surface Water Division has intimate contact and accepted responsibilities in connection with the flow of streams and water surveys generally and the States have come to depend on the cooperation of this agency. The State of North Dakota, at the request of its representatives, was rather reluctantly relieved of the responsibility and expense of operations because the interests of the State in the results were so disproportionally small.

In determining the amount of water subject to allocation, the "divertible flow" principle was chosen over the "depletion" principle, because the former had been used in earlier negotiations and was more familiar to the commissioners, who were assured by the consultants that the latter had no outstanding advantages even though it had been selected on the upper Colorado.

Existing and future domestic and stock water uses were excluded from the provisions of the compact, with a limitation on the size of stock ponds. A large number of stock ponds have been constructed or are contemplated by individuals and agencies in the open range country, and the question has been raised

whether their multiplication might have a material effect on water supplies available for major purposes. A study of the proposed developments in the Yellowstone River Basin discloses that the feasibility of no project depends on or would be affected appreciably by these ponds, located as they are in the plains area away from live streams and collecting water that otherwise would probably never reach the river system anyway.

Federal Interests

In the course of the negotiations, a letter was received from the President enclosing a memorandum from the Bureau of the Budget and calling attention to questionable provisions in recent interstate compacts which were apparently contradictory and which imposed restrictions on the use of water by the United States. The suggestions in that letter have been followed and incorporation in this compact of provisions such as were referred to has been scrupulously avoided. In article XVI of the compact, it is specifically provided that nothing in that document shall "impair or affect * * * any rights or powers of the United States of America, its agents, or instrumentalities, in and to the use of the waters of the Yellowstone River Basin. * * * " This unmistakably clear language, together with the provision that nothing in the compact shall "subject any property of the United States of America, its agents or instrumentalities, to the laws of any State to an extent other than the extent to which these laws would apply without regard to the compact," furnishes complete protection to the United States against any

possible adverse effect, the existence of which I cannot foresee, that might arise from any other portion of the compact to which the Congress' consent is given. Attention is specifically invited, moreover, to the fact that although the States have, in paragraph D of article VII of the compact, agreed among themselves that the use of allocated waters on Federal projects constructed after the date of the compact shall be "charged" to the State in which the water is used, they have not attempted to limit its use to those waters.

The particular concerns of departments and agencies of the Federal Government were inquired into and given serious consideration throughout the negotiations. All agencies known to have interests in the basin were kept informed of the progress of negotiations and were invited to have representatives present at the meetings. These included the Department of the Army, Department of Interior, Department of Agriculture, Federal Power Commission, Department of Commerce, Reconstruction Finance Corporation.

Two separate meetings were held with Federal men to bring out their views. Regular meetings of the commissioners were attended by 12 to 20 men from Federal agencies. When a draft of compact was ready for final consideration, copies were circulated to the following agencies with request for comment in 30 days. Helpful comments and suggestions were received from Department of Agriculture, Corps of Engineers, Bureau of Reclamation, National Park Service, Bureau of Indian Affairs.

All comments were given consideration, some suggested language was adopted verbatim and other

suggestions were taken care of in various ways. It is believed that there are no provisions in this compact and no omissions to which Federal agencies seriously object. However, attention has been directed by the Bureau of Reclamation to subparagraph E-2 of article V which excludes from the provisions of the compact "Devices and facilities for the control and regulation of surface waters." This language was inserted to meet a request by the Department of Agriculture for exclusion of so-called "water-spreading devices" which are recommended for installation on the open plains to reduce erosion from heavy local rains. It is not believed that this could be interpreted as applying to major storage reservoirs.

It should be specially noted that there are great areas of Indian land in the Yellowstone River Basin in both Montana and Wyoming, much of which is irrigated or proposed to be irrigated, and the interest of the Bureau of Indian Affairs in the compact is important. Indian Bureau men attended all meetings, furnished much information, and lent continuous engineering help to subcommittees. The language submitted by them to cover Indian interests in the compact was adopted verbatim.

Conclusion

The effort that has been carried on by the States for nearly 20 years to secure a compact for the division of the waters of the Yellowstone River and its tributaries would seem to be conclusive evidence that such a compact is needed. The instrument submitted herewith is the result of a year's intensive study and discussion by a large number of qualified State

commissioners with the benefit of all past negotiations and the cooperation of many Federal agencies and private individuals, ending finally in agreement by all. The plan proposed appears to be easily installed, workable, and not requiring the establishment of a large new organization for its operation. The division of the waters is believed to be equitable and fair. Obstacles to the continued orderly development of resources would be removed. The rights of the United States seem to be fully protected. Therefore I recommend that the proposed compact be approved by the Congress of the United States.

R. J. NEWELL,
Federal Representative,
Yellowstone River Compact Negotiations.

NOTE. – It is now understood that the archives of the Department of State are no longer the proper depository for such documents as the Yellowstone compact. The General Services Administration having taken over this function, the authoritative original of the compact, if finally approved, will be filed with that body.

R. J. N.

EXECUTIVE OFFICE OF THE PRESIDENT,
BUREAU OF THE BUDGET,
Washington 25, D.C., September 14, 1951.

Hon. JOSEPH C. O'MAHONEY
United States Senate, Washington 25, D.C.

MY DEAR SENATOR O'MAHONEY: Receipt is acknowledged of your letter, dated April 12, 1951,

requesting our report on S. 1311, a bill granting the consent of Congress to a compact entered into by the States of Montana, North Dakota, and Wyoming relating to the waters of the Yellowstone River.

In response to my request for the views of the Department of Justice, the Deputy Attorney General indicates that while article VI of the compact is apparently designed to protect the interests of the United States, the language used is rather ambiguous. The preservation of the rights of the United States is rendered somewhat obscure due to the possible conflicting interpretations of the terminology "area of waters" in the language "To impair or affect the sovereignty or jurisdiction of the United States of America in or over the area of waters affected by such compact, any rights or powers of the United States of America, its agencies, or instrumentalities, in and to the use of the waters of the Yellowstone River Basin nor its capacity to acquire rights in and to the use of said waters."

He also calls attention to article V, B of the compact under which the signatory States allot themselves all "unused and unappropriated waters of the interstate tributaries of the Yellowstone River" as possibly depriving the United States of the use of surplus water it has been anticipated would flow into the Missouri River.

Also in the Deputy Attorney General's opinion, the broad authority contained in the provision that the commission may sue and be sued might be construed, in view of the Federal representative thereon, to indicate that the Federal Government has waived its sovereign immunity from suit.

Finally, he recommends that in the event Congress should desire to approve the compact as drafted, such approval be essentially in the following language:

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That approval by the Congress is hereby given to the Yellowstone River compact: *Provided, however*, That this approval of the compact does not in any way subject the United States to the terms of the compact or affect its sovereignty, jurisdiction, power, authority, rights to the use of water, property, prerogatives, or responsibilities in, to, or over the Yellowstone River and its tributaries."

The Secretary of the Interior, in his proposed report on H. R. 3544, the companion bill to S. 1311, expresses the opinion that the provisions in the compact for the selection of the Federal representative by the Geological Survey rather than the President and that the commission should be subject to suit are regrettable and that the latter "may raise some interesting constitutional questions in the future."

Similarly conflicting provisions appearing in previously consummated compacts prompted the President on May 3, 1950, to write the Federal representatives on various compact commissions cautioning them to exert all efforts to eliminate or correct the areas of possible conflict which might impose restrictions on the use of waters by the United States.

This office is in agreement that the compact method is the proper and logical manner for States to allocate the waters of interstate streams. It is essential, however, that such compacts include adequate

provisions to preserve the rights and interests of the United States and for appointment by the President of a Federal representative as a member of the compact commission. Since the Yellowstone River compact which would be approved by S. 1311 has been ratified by the States of Montana, North Dakota, and Wyoming, it may not now be feasible of revision to provide for the selection of the Federal representative by the President rather than by Geological Survey. While I believe that as a general rule the former is preferable, there may be some question whether in this case the resubmission of the compact to the States to provide for selection of a Federal representative by the President rather than by Geological Survey is justified. It is of fundamental importance, however, that the compact protect the rights and interests of the United States in these waters. The language of the proposed amendment to the bill prepared by the Department of Justice would seem to provide such protection. Accordingly, subject to the consideration of the above comments by the Congress, there would appear to be no objection to enactment of S. 1311 if amended to assure the protection of the interests of the United States as recommended by the Department of Justice.

Sincerely yours,

ELMER B. STAATS,
Acting Director.

DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SECRETARY,
Washington 25, D. C., September 27, 1951.

Hon. JOSEPH C. O'MAHONEY,
Chairman, Committee on Interior and Insular Affairs,
United States Senate, Washington 25, D. C.

MY DEAR SENATOR O'MAHONEY: I have for report S. 1311, a bill granting the consent of Congress to a compact entered into by the States of Montana, North Dakota, and Wyoming, relating to the waters of the Yellowstone River. The compact, as approved by the 1951 legislative assemblies of the signatory States, is set out in the subject bill.

One very important part of the plan of this Department for improvements in the Missouri River Basin set forth in Senate Document 191, Seventy-eighth Congress, and approved and authorized for construction in the acts of December 22, 1944 (58 Stat. 887, 891), and July 24, 1946 (60 Stat. 641, 653), is that of supplying new and supplemental water for the irrigation of well over 700,000 acres of land in the Yellowstone River Basin, the installation in that basin of more than 300,000 kilowatts of hydroelectric generating capacity, and provision of reservoirs for these and other purposes with a total capacity of more than 4,250,000 acre-feet. While these figures cannot be regarded as final, they are indicative of the great importance of that basin to the economy of the entire Missouri River Basin and of the Nation. The negotiation of the Yellowstone River Basin compact was, and the Congress' consent to it will be, an important step toward permitting realization of the basin's potentialities without bickering between the States.

The compact provides that its operation shall not "impair or affect the sovereignty or jurisdiction of the United States of America in and over the area of waters affected" by it or "any rights or powers of the United States of America, its agents, or instrumentalities, in and to the use of the waters of the Yellowstone River Basin" or its capacity to acquire such rights, that it shall not be taken to "subject any property of the United States of America, its agencies, or instrumentalities, to the laws of any State to an extent other than the extent to which these laws would apply without regard to the compact," and that its terms do not cover "waters within or waters which contribute to the flow of streams within the Yellowstone National Park." The compact, moreover, provides that its terms shall not "be so construed or interpreted as to affect adversely any rights to the use of the waters of the Yellowstone River and its tributaries owned by or for Indians, Indian tribes, and their reservations." The water rights of the Indians were reserved by the Indians at the time of the creation of the respective reservations by the treaties entered into by the Indians with the United States. These Indian water rights have been recognized by the Supreme Court of the United States. The most important decision is the case of *Winters v. United States* reported in 207 U.S. 564. This situation explains the inclusion of the language just quoted. A further safeguard to Federal interests is to be found in section 2 of S. 1311; i.e., in the express reservation to Congress of its right to alter, amend, or repeal the act.

It long has been recognized that the fuller use of the water resources of the Yellowstone River Basin

contemplated in Senate Document 191 is dependent entirely upon the construction and operation of storage reservoirs to regulate and conserve the water yields of the principal streams of the basin. These streams, in addition to the Yellowstone River itself, are its four large interstate tributaries, each rising in Wyoming and flowing into Montana: The Clarks Fork, Yellowstone River; the Big Horn River; the Tongue River; and the Powder River. Of these streams, the Yellowstone River, which is the main stem of the river system of the Yellowstone Basin, needed little consideration in the negotiation of the compact because it is almost entirely in Montana and its water yield seems to be adequate for any program of feasible developments along its course, and the Clarks Fork, Yellowstone River, one of the tributaries, is not likely to experience water shortages. Hence, the problem streams are the three remaining large interstate tributaries. The elements that make these interstate tributaries problem streams are the existing irrigated developments and the potential and possible irrigated developments. (In this connection, I am advised that the compact commissioners recognized a distinction between potential developments and possible developments. Potential developments are those which, it was thought, are definitely feasible, while possible developments are those which could be developed only at a very high cost or for which a water supply seemed questionable.)

The practical accomplishment, in the circumstances, of an equitable apportionment of the benefits of the waters of the Yellowstone River system among the States of Wyoming, Montana, and North Dakota will require the construction, at strategic sites, at or

near the Wyoming-Montana State line, of storage reservoirs so that the residual flows from Wyoming can be controlled and conserved for use in the lower States of Montana and North Dakota. Fortunately, such strategic reservoir sites are available on the Big Horn River, the Tongue River, and the Powder River.

Article V of the compact is the article that sets out the apportionment of the benefits of the water resources of the basin among the signatory States that they have agreed upon. Extensive studies by an engineering committee, appointed by the commission to advise it, disclosed that little could be gained, from a water supply standpoint, by attempting, in the compact, the regulation and administration of existing appropriative rights in the signatory States. (The engineering committee comprised the State engineers of the three States and two Federal engineers from the Bureau of Reclamation and the Bureau of Indian Affairs.) Accordingly, paragraph A of article V recognizes the appropriative rights to the beneficial uses of the water of the Yellowstone River system existing in each signatory State as of January 1, 1950, and it permits the continued enjoyment of such rights in accordance with the laws governing the acquisition and use of water under the doctrine of appropriation.

Paragraph B of article V is the core of the compact. The following analysis of this paragraph is made:

(1) The unused and unappropriated waters of the interstate tributaries only are treated; i.e., the waters that are residual to those required for the enjoyment of the appropriative rights that are recognized in paragraph A of article V.

(2) The supplemental water supplies that are needed for the better enjoyment of the rights recognized in paragraph A of article V are given a preferred status over water supplies for new projects.

(3) The water that is residual after the enjoyment of the rights in paragraph A of article V and after the furnishing of the supplemental water supplies to the projects with the rights recognized in paragraph A are allocated to Wyoming and to Montana in stated percentages. I am informed that these percentages were calculated, in accordance with the recommendation of the engineering committee, by dividing the total of the potential and possible acres in Wyoming and in Montana by the total of the potential and possible acres in both States.

In paragraph C of article V, there is adopted a modified version of the divertible flow principle. Under the formula adopted, the apportionments stated in paragraph B are made operative in terms of cumulative volumes of water throughout a water year, fixed as October 1 of any year through September 30 of the succeeding year, in order to accommodate the new projects in the basin which must rely on storage water rather than on natural flow.

Considered with paragraph A of article V, paragraph D of article V gives to the Lower Yellowstone Federal reclamation project in Montana and North Dakota the protection of a right existing January 1, 1950. Additionally, paragraph D recognizes all rights in the beneficial use of water than existed in Montana and North Dakota on January 1, 1950, and that divert below Intake, Mont., and it permits the beneficial use of the flow of water of the Yellowstone River below Intake, Mont., on lands within Montana and

North Dakota on a proportionate basis of acreage irrigated. This latter provision is important, particularly to North Dakota, because the flow of water of the Yellowstone River below Intake, Mont., will be residual water after the use of water above Intake, Mont. The flow will thus be not only a regulated flow, as a consequence of the construction and operation of the reservoirs at the strategic sites on the Big Horn River, the Tongue River, and the Powder River, but it will also include the return flows that are certain to appear below Intake, Mont., with the expansion of irrigation after storage water becomes available. The sharing of this residual flow by Montana and North Dakota, on a proportionate basis of acreage irrigated, will keep the new developments in the two States in balance and minimize future interstate disputes.

The inclusion in paragraph E of article V of special provisions relating to stock water ponds and to "devices and facilities for the control and regulation of surface waters" is a recognition of the importance of stock raising, and modern soil-conservation practices in the economy of the area. Neither of these items will adversely affect existing Federal projects in the basin. Item 2 of paragraph E, moreover recognizes and rests upon the distinction between surface waters and appropriable waters. In other words, waters which diffuse over the land and do not flow intermittently or continually through and into natural water courses are permitted, so far as the compact is concerned, to be controlled and regulated by devices and facilities installed by the owner of the land on which such waters are diffused.

Paragraph F of article V amounts to a recognition that the allocations made in article V may have to be

reconsidered from time to time so that they can be made to conform to demonstrated experience where that proves to be at variance with the calculated belief, such belief necessarily governing the allocations in the first instance.

Articles VII, VIII, and IX implement the use of allocations made in article V. Of particular interest is the provision in article VII expressly permitting diversions to be made and structures to be erected in one State for the benefit of users in another. The inclusion of this provision is in harmony with the decision of the Supreme Court in *Weiland* v. *Pioneer Irrigation Co.* (259 U. S. 498 (1922)). Also of importance is the phrasing of article VII, paragraph D, which, while providing that the use of allocated waters on Federal projects constructed after the date of the compact shall be charged to the State in which the water is used, does not attempt to limit the use of water in any of the States of the basin by the Federal Government.

I regret the spirit of localism that induced the inclusion in article X of a provision that "No water shall be diverted from the Yellowstone River Basin without the unanimous consent of all the signatory States." Though I agree that preference in the use of water resources ought generally to be given to the basin of origin, it is hard for me to believe that this is more than a generally desirable rule, let alone that any deviation from a very tight version of it should require the sanction of three State legislatures. Much as I regret its inclusion, however, I do not believe that it warrants a refusal by the Congress to enact S. 1311. The same is true of that portion of paragraph A of article III which provides for selection of the

United States representative on the Yellowstone River Commission by the Director of the Geological Survey rather than by the President of the United States, that portion of paragraph D of the same article which purports to cast certain duties on specified Federal officials, and that portion of paragraph G of the same article which provides that the Yellowstone River Commission "shall have power to sue and be sued in its official capacity in any Federal court of the signatory States." All of these are matters which should properly be dealt with in Federal legislation rather than in a compact and the last may raise some interesting constitutional questions in the future.

As between the States of Wyoming and Montana – North Dakota being excepted in accordance with its wishes – the compact, in article III, is to be administered by a commission composed of a representative from Wyoming and a representative from Montana, each to be selected by the Governor in the manner that the State may choose, and, as I have already noted, one representative selected by the Director of the United States Geological Survey or whatever Federal agency may succeed to the functions and duties of that agency. The Federal official is to act as chairman of the commission, but he is not to vote except upon matters and points upon which the States' representatives may be in disagreement.

Generally, article III is in line with the over-all purpose of an interstate compact to employ the methods of negotiation and arbitration rather than that of adjudication in interstate disputes, the negotiation and arbitration methods being the more adaptable to changing conditions.

The remaining articles of the compact are those usual in such an instrument and do not call for specific comment.

From the advice that has been given to me, it is my belief that the apportionment agreed upon by the compact commission was entered into with due inquiry, that it is an honest exercise of judgment, and that it is equitable.

You have been advised by the Bureau of the Budget, I understand, that the Department of Justice recommends revision of S. 1311 to include provision that the Congress' consent to the Yellowstone compact "does not in any way subject the United States to the terms of the compact or affect its sovereignty, jurisdiction, power, authority, rights to the use of water, property, prerogatives, or responsibilities in, to, or over the Yellowstone River and its tributaries." The Bureau of the Budget has further advised that, subject to consideration by the Congress of certain other comments contained in its letter to you dated September 14, "there would appear to be no objection to enactment of S. 1311 if amended to assure the protection of the interests of the United States as recommended by the Department of Justice." I recommend enactment of S. 1311 with such amendments as are required in the light of the views expressed by Mr. Staats in the letter just referred to.

The Bureau of the Budget has advised that there is no objection to the submission of this report to your committee.

Sincerely yours,

OSCAR L. CHAPMAN
Secretary of the Interior.

APPENDIX B

82D CONGRESS)	HOUSE OF (	REPORT
1st Session)	REPRESENTATIVES (	No. 1118

GRANTING THE CONSENT AND APPROVAL OF CONGRESS TO A COMPACT ENTERED INTO BY THE STATES OF MONTANA, NORTH DAKOTA, AND WYOMING RELATING TO THE WATERS OF THE YELLOWSTONE RIVER

OCTOBER 10, 1951. – Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

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Mr. ENGLE, from the Committee on Interior and Insular Affairs, submitted the following

REPORT

[To accompany H. R. 3544]

The Committee on Interior and Insular Affairs, to whom was referred the bill (H. R. 3544) granting the consent and approval of Congress to a compact entered into by the States of Montana, North Dakota, and Wyoming relating to the waters of the Yellowstone River, having considered the same, report favorably thereon with amendments and recommend that the bill, as amended, do pass.

The amendments are as follows:

AMENDMENTS TO H. R. 3544

Page 1, line 3, strike the following words: "and approval".

Page 1, line 3, after the word "of" insert the word "the".

Page 1, line 5, after the comma insert the words "which was".

Page 1, line 9, after the word "and" insert the words "which was".

Page 12, line 16, after the word "period" insert the word "from".

Page 20, line 20, place a period after the word "Chris" which appears in two places.

Page 21, line 1, strike the initial "R" and insert the initial "E".

Page 21, line 18, strike in two places the initial "K" and insert in two places the initial "E".

Page 22, line 2, strike in two places the initial "H" and insert in two places the initial "M".

Page 22, line 3, place quotation marks at the beginning of the paragraph.

Page 22, line 8, place quotation marks after the word "America".

Page 22, line 9, strike out the words "and repeal this act" and insert in lieu thereof "or repeal section 1 of this Act".

Page 22, line 10, after the period insert the following new sentence:

This reservation shall not be construed to prevent the vesting of rights to the use of water pursuant to applicable law and no alteration, amendment, or repeal of section 1 of this Act shall be held to affect rights so vested.

Amend the title so as to read as follows:

A bill granting the consent of Congress to a compact entered into by the States of Montana, North Dakota, and Wyoming relating to the waters of the Yellowstone River.

PURPOSE OF THE BILL

The negotiation of the Yellowstone River Basin compact was an important step toward full utilization of the waters of the Yellowstone River. The consent of the Congress to the compact entered into by the States of Montana, Wyoming, and North Dakota will be another forward move toward maximum beneficial use of these waters without unnecessary conflict between the States over the right to its use.

It has long been recognized that the maximum beneficial use of the water resources of the Yellowstone River in the Missouri River Basin is dependent upon the construction and operation of storage reservoirs. A plan for such reservoirs was set forth in Senate Document No. 191, Seventy-eighth Congress. If such a plan is to become a reality for the Yellowstone River Basin, construction of storage reservoirs will be required at sites at or near the Wyoming-Montana line so that the residual flows from Wyoming

can be controlled for use in the lower States of Montana and North Dakota.

Reasons for the Amendments

One of the reasons for the numerous amendments is to make H. R. 3544 conform to Senate bill 1311. Also, other amendments were made to correct H. R. 3544 so it reads exactly as the official copy of the compact adopted by the States.

Explantion of the Bill

Article V of the compact is the article that sets out the apportionment of the benefits of the water resources of the basin among the signatory States that they have agreed upon. Extensive studies by an engineering committee, appointed by the commission to advise it, disclosed that little could be gained, from a water-supply standpoint, by attempting, in the compact, the regulation and administration of existing appropriative rights in the signatory States. (The engineering committee comprised the State engineers of the three States and two Federal engineers from the Bureau of Reclamation and the Bureau of Indian Affairs.)

Accordingly, paragraph A of article V recognizes the appropriative rights to the beneficial uses of the water of the Yellowstone River system existing in each signatory State as of January 1, 1950, and it permits the continued enjoyment of such rights in

accordance with the laws governing the acquisition and use of water under the doctrine of appropriation.

Paragraph B of article V is the core of the compact. The following analysis of this paragraph is made:

(1) The unused and unappropriated waters of the interstate tributaries only are treated – i.e., the waters that are residual to those required for the enjoyment of the appropriative rights that are recognized in paragraph A of article V.

(2) The supplemental water supplies that are needed for the better enjoyment of the rights recognized in paragraph A of article V are given a preferred status over water supplies for new projects.

(3) The water that is residual after the enjoyment of the rights in paragraph A of article V and after the furnishing of the supplemental water supplies to the projects with the rights recognized in paragraph A are allocated to Wyoming and to Montana in stated percentages. I am informed that these percentages were calculated, in accordance with the recommendation of the engineering committee, by dividing the total of the potential and possible acres in Wyoming and in Montana by the total of the potential and possible acres in both States.

In paragraph C of article V, there is adopted a modified version of the divertible flow principle. Under the formula adopted, the apportionments stated in paragraph B are made operative in terms of cumulative volumes of water throughout a water

year, fixed as October 1 of any year through September 30 of the succeeding year, in order to accommodate the new projects in the basin which must rely on storage water rather than on natural flow.

Considered with paragraph A of article V, paragraph D of article V gives to the lower Yellowstone Federal reclamation project in Montana and North Dakota the protection of a right existing on January 1, 1950. Additionally, paragraph D recognizes all rights to the beneficial use of water that existed in Montana and North Dakota on January 1, 1950, and that divert below Intake, Mont., and it permits the beneficial use of the flow of water of the Yellowstone River below Intake, Mont., on lands within Montana and North Dakota on a proportionate basis of acreage irrigated. This latter provision is important, particularly to North Dakota, because the flow of water of the Yellowstone River below Intake, Mont., will be residual water after the use of water above Intake, Mont. The flow will thus be not only a regulated flow, as a consequence of the construction and operation of the reservoirs at the strategic sites on the Big Horn River, the Tongue River, and the Powder River, but it will also include the return flows that are certain to appear below Intake, Mont., with the expansion of irrigation after storage water becomes available. The sharing of this residual flow by Montana and North Dakota, on a proportionate basis of acreage irrigated, will keep the new developments in the two States in balance and minimize future interstate disputes.

The inclusion in paragraph E of article V of special provisions relating to stock water ponds and

to "devices and facilities for the control and regulation of surface waters" is a recognition of the importance of stock raising and modern soil conservation practices in the economy of the area. Neither of these items will adversely affect existing Federal projects in the basin. Item 2 of paragraph E, moreover, recognizes and rests upon the distinction between surface waters and appropriable waters. In other words, waters which diffuse over the land and do not flow intermittently or continually through and into natural water courses are permitted, so far as the compact is concerned, to be controlled and regulated by devices and facilities installed by the owner of the land on which such waters are diffused.

Paragraph F of article V amounts to a recognition that the allocations made in article V may have to be reconsidered from time to time so that they can be made to conform to demonstrated experience where that proves to be at variance with the calculated belief, such belief necessarily governing the allocations in the first instance.

Articles VII, VIII, and IX implement the use of allocations made in article V. Of particular interest is the provision in article VII expressly permitting diversions to be made and structures to be erected in one State for the benefit of users in another. The inclusion of this provision is in harmony with the decision of the Supreme Court in *Weiland* v. *Pioneer Irrigation Co.* (259 U.S. 498 (1922)). Also of importance is the phrasing of article VII, paragraph D, which, while providing that the use of allocated waters on Federal projects constructed after the date

of the compact shall be charged to the State in which the water is used, does not attempt to limit the use of water in any of the States of the basin by the Federal Government.

Generally, article III is in line with the over-all purpose of an interstate compact to employ the methods of negotiation and arbitration rather than that of adjudication in interstate disputes, the negotiation and arbitration methods being the more adaptable to changing conditions.

The remaining articles of the compact are those usual in such an instrument and do not call for specific comment.

Rights of the United States are Protected

The compact provides that its operation shall not "impair or affect the sovereignty or jurisdiction of the United States of America in and over the area of waters affected" by it or "any rights or powers of the United States of America, its agents, or instrumentalities, in and to the use of the waters of the Yellowstone River Basin" or its capacity to acquire such rights, that it shall not be taken to "subject any property of the United States of America its agencies, or instrumentalities, to the laws of any State to an extent other than the extent to which these laws would apply without regard to the compact," and that its terms do not cover "waters within or waters which contribute to the flow of streams within the Yellowstone National Park." The compact, moreover, provides that

its terms shall not "be so construed or interpreted as to affect adversely any rights to the use of the waters of the Yellowstone River and its tributaries owned by or for Indians, Indian tribes, and their reservations." The water rights of the Indians were reserved by the Indians at the time of the creation of the respective reservations by the treaties entered into by the Indians with the United States. These Indian water rights have been recognized by the Supreme Court of the United States. The most important decision is the case of *Winters* v. *United States* (reported in 207 U.S. 564). This situation explains the inclusion of the language just quoted. A further safeguard to Federal interests is to be found in section 2 of H. R. 3544 – i.e., in the express reservation to Congress of its right to alter, amend, or repeal the act.

The favorable report of the Department of the Interior reads as follows:

UNITED STATES DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SECRETARY
Washington, D.C., September 27, 1951.

Hon. JOHN R. MURDOCK,
Chairman, Committee on Interior and Insular Affairs,
House of Representatives, Washington, D.C.

MY DEAR MR. MURDOCK: I have for report H. R. 3544, a bill granting the consent and approval of Congress to a compact entered into by the States of Montana, North Dakota, and Wyoming, relating to the waters of the Yellowstone River. The compact, as approved by the 1951 legislative assemblies of the signatory States, is set out in the subject bill.

One very important part of the plan of this Department for improvements in the Missouri River Basin set forth in Senate Document No. 191, Seventy-eighth Congress, and approved and authorized for construction in the acts of December 22, 1944 (58 Stat. 887, 891), and July 24, 1946 (60 Stat. 641, 653), is that of supplying new and supplemental water for the irrigation of well over 700,000 acres of land in the Yellowstone River Basin, the installation in that basin of more than 300,000 kilowatts of hydroelectric generating capacity, and provision of reservoirs for these and other purposes with a total capacity of more than 4,250,000 acre-feet. While these figures cannot be regarded as final, they are indicative of the great importance of that basin to the economy of the entire Missouri River Basin and of the Nation. The negotiation of the Yellowstone River Basin compact was, and the Congress' consent to it will be, an important step toward permitting realization of the basin's potentialities without bickering between the States.

The compact provides that its operation shall not "impair or affect the sovereignty or jurisdiction of the United States of America in and over the area of waters affected" by it or "any rights or powers of the United States of America, its agents, or instrumentalities, in and to the use of the waters of the Yellowstone River Basin" or its capacity to acquire such rights, that it shall not be taken to "subject any property of the United States of America, its agencies, or instrumentalities, to the laws of any State to an extent other than the extent to which these laws would apply without regard to the compact," and that its terms do not cover "waters within or waters which contribute to the flow of streams within the Yellowstone

National Park." The compact, moreover, provides that its terms shall not "be so construed or interpreted as to affect adversely any rights to the use of the waters of the Yellowstone River and its tributaries owned by or for Indians, Indian tribes, and their reservations." The water rights of the Indians were reserved by the Indians at the time of the creation of the respective reservations by the treaties entered into by the Indians with the United States. These Indian water rights have been recognized by the Supreme Court of the United States. The most important decision is the case of *Winters* v. *United States* (reported in 207 U.S. 564). This situation explains the inclusion of the language just quoted. A further safeguard to Federal interests is to be found in section 2 of H. R. 3544 – i.e., in the express reservation to Congress of its right to alter, amend, or repeal the act.

It has long has been recognized that the fuller use of the water resources of the Yellowstone River Basin contemplated in Senate Document No. 191 is dependent entirely upon the construction and operation of storage reservoirs to regulate and conserve the water yields of the principal streams of the basin. These streams, in addition to the Yellowstone River itself, are its four large interstate tributaries, each rising in Wyoming and flowing into Montana: The Clark's Fork, Yellowstone River; the Big Horn River; the Tongue River; and the Powder River. Of these streams, the Yellowstone River, which is the main stem of the river system of the Yellowstone Basin, needed little consideration in the negotiation of the compact because it is almost entirely in Montana and its water yield seems to be adequate for any program

of feasible developments along its course, and the Clark's Fork, Yellowstone River, one of the tributaries, is not likely to experience water shortages. Hence, the problem streams are the three remaining large interstate tributaries. The elements that make these interstate tributaries problem streams are the existing irrigated developments and the potential and possible irrigated developments. (In this connection, I am advised that the compact commissioners recognized a distinction between potential developments and possible developments. Potential developments are those which, it was thought, are definitely feasible, while possible developments are those which could be developed only at a very high cost or for which a water supply seemed questionable.)

The practical accomplishment, in the circumstances, of an equitable apportionment of the benefits of the waters of the Yellowstone River system among the States of Wyoming, Montana, and North Dakota will require the construction, at strategic sites, at or near the Wyoming-Montana State line, of storage reservoirs so that the residual flows from Wyoming can be controlled and conserved for use in the lower States of Montana and North Dakota. Fortunately, such strategic reservoir sites are available on the Big Horn River, the Tongue River, and the Powder River.

Article V of the compact is the article that sets out the apportionment of the benefits of the water resources of the basin among the signatory States that they have agreed upon.

Extensive studies by an engineering committee, appointed by the Commission to advise it, disclosed that little could be gained, from a water-supply standpoint, by attempting, in the compact, the regulation

and administration of existing appropriative rights in the signatory States. (The engineering committee comprised the State engineers of the three States and two Federal engineers from the Bureau of Reclamation and the Bureau of Indian Affairs.) Accordingly, paragraph A of article V recognizes the appropriative rights to the beneficial uses of the water of the Yellowstone River system existing in each signatory State as of January 1, 1950, and it permits the continued enjoyment of such rights in accordance with the laws governing the acquisition and use of water under the doctrine of appropriation.

Paragraph B of article V is the core of the compact. The following analysis of this paragraph is made:

(1) The unused and unappropriated waters of the interstate tributaries only are treated – i.e., the waters that are residual to those required for the enjoyment of the appropriative rights that are recognized in paragraph A of article V.

(2) The supplemental water supplies that are needed for the better enjoyment of the rights recognized in paragraph A of article V are given a preferred status over water supplies for new projects.

(3) The water that is residual after the enjoyment of the rights in paragraph A of article V and after the furnishing of the supplemental water supplies to the projects with the rights recognized in paragraph A are allocated to Wyoming and to Montana in stated percentages. I am informed that these percentages were calculated, in accordance with the recommendation of the

engineering committee, by dividing the total of the potential and possible acres in Wyoming and in Montana by the total of the potential and possible acres in both States.

In paragraph C of article V, there is adopted a modified version of the divertible flow principle. Under the formula adopted, the apportionments stated in paragraph B are made operative in terms of cumulative volumes of water throughout a water year, fixed as October 1 of any year through September 30 of the succeeding year, in order to accommodate the new projects in the basin which must rely on storage water rather than on natural flow.

Considered with paragraph A of article V, paragraph D of article V gives to the lower Yellowstone Federal reclamation project in Montana and North Dakota the protection of a right existing on January 1, 1950. Additionally, paragraph D recognizes all rights to the beneficial use of water that existed in Montana and North Dakota on January 1, 1950, and that divert below Intake, Mont., and it permits the beneficial use of the flow of water of the Yellowstone River below Intake, Mont., on lands within Montana and North Dakota on a proportionate basis of acreage irrigated. This latter provision is important, particularly to North Dakota, because the flow of water of the Yellowstone River below Intake, Mont., will be residual water after the use of water above Intake, Mont. The flow will thus be not only a regulated flow, as a consequence of the construction and operation of the reservoirs at the strategic sites on the Big Horn River, the Tongue River, and the Powder River, but it will also include the return flows that are certain to appear below Intake, Mont., with the expansion of

irrigation after storage water becomes available. The sharing of this residual flow by Montana and North Dakota, on a proportionate basis of acreage irrigated, will keep the new developments in the two States in balance and minimize future interstate disputes.

The inclusion in paragraph E of article V of special provisions relating to stock water ponds and to "devices and facilities for the control and regulation of surface waters" is a recognition of the importance of stock raising and modern soil conservation practices in the economy of the area. Neither of these items will adversely affect existing Federal projects in the basin. Item 2 of paragraph E, moreover, recognizes and rests upon the distinction between surface waters and appropriable waters. In other words, waters which diffuse over the land and do not flow intermittently or continually through and into natural water courses are permitted, so far as the compact is concerned, to be controlled and regulated by devices and facilities installed by the owner of the land on which such waters are diffused.

Paragraph F of article V amounts to a recognition that the allocations made in article V may have to be reconsidered from time to time so that they can be made to conform to demonstrated experience where that proves to be at variance with the calculated belief, such belief necessarily governing the allocations in the first instance.

Articles VII, VIII, and IX implement the use of allocations made in article V. Of particular interest is the provision in article VII expressly permitting diversions to be made and structures to be erected in one State for the benefit of users in another. The inclusion of this provision is in harmony with the

decision of the Supreme Court in *Weiland* v. *Pioneer Irrigation Co.* (259 U.S. 498 (1922)). Also of importance in the phrasing of article VII, paragraph D, which, while providing that the use of allocated waters on Federal projects constructed after the date of the compact shall be charged to the State in which the water is used, does not attempt to limit the use of water in any of the States of the basin by the Federal Government.

I regret the spirit of localism that induced the inclusion in article X of a provision that "No water shall be diverted from the Yellowstone River Basin without the unanimous consent of all the signatory States." Though I agree that preference in the use of water resources ought generally to be given to the basin of origin, it is hard for me to believe that this is more than a generally desirable rule, let alone that any deviation from a very tight version of it should require the sanction of three State legislatures. Much as I regret its inclusion, however, I do not believe that it warrants a refusal by the Congress to enact H. R. 3544. The same is true of that portion of paragraph A of article III which provides for selection of the United States representative on the Yellowstone River Commission by the Director of the Geological Survey rather than by the President of the United States, that portion of paragraph D of the same article which purports to cast certain duties on specified Federal officials, and that portion of paragraph G of the same article which provides that the Yellowstone River Commission "shall have power to sue and be sued in its official capacity in any Federal court of the signatory States." All of these are matters which should properly be dealt with in Federal legislation

rather than in a compact and the last may raise some interesting constitutional questions in the future.

As between the States of Wyoming and Montana – North Dakota being excepted in accordance with its wishes – the compact, in article III, is to be administered by a commission composed of a representative from Wyoming and a representative from Montana, each to be selected by the Governor in the manner that the State may choose, and, as I have already noted, one representative selected by the Director of the United States Geological Survey or whatever Federal agency may succeed to the functions and duties of that agency. The Federal official is to act as chairman of the commission, but he is not to vote except upon matters and points upon which the States' representatives may be in disagreement.

Generally, article III is in line with the over-all purpose of an interstate compact to employ the methods of negotiation and arbitration rather than that of adjudication in interstate disputes, the negotiation and arbitration methods being the more adaptable to changing conditions.

The remaining articles of the compact are those usual in such an instrument and do not call for specific comment.

From the advice that has been given to me, it is my belief that the apportionment agreed upon by the compact commission was entered into with due inquiry, that it is an honest exercise of judgment, and that it is equitable.

I invite your committee's attention to two minor differences between H. R. 3544 and S. 1311, its Senate companion. In line 3, page 1, of H. R. 3544, the "consent and approval" of the Congress is given to the

compact; in line 3, page 1, of S. 1311, the "consent" of the Congress is given. The latter follows the language of the Constitution, and is therefore, I believe, to be preferred. Section 2 of H. R. 3544 merely states an express reservation of the Congress' right to alter, amend, or repeal the act; section 2 of S. 1311 couples this with a declaration that "This reservation shall not be construed to prevent the vesting of rights to the use of water pursuant to applicable law and no alteration, amendment, or repeal of section 1 of this act shall be held to affect rights so vested." Though I believe that this additional language is not strictly necessary, it will, I believe, serve to allay doubts and fears. I, therefore, recommend that section 2 of H. R. 3544 be amended to conform to the language adopted in section 2 of S. 1311.

I have been advised by the Bureau of the Budget, in connection with S. 1311, that the Department of Justice recommends revision of the bill to include provision that the Congress' consent to the Yellowstone compact "does not in any way subject the United States to the terms of the compact or affect its sovereignty, jurisdiction, power, authority, rights to the use of water, property, prerogatives, or responsibilities in, to, or over the Yellowstone River and its tributaries." I have been further advised by the Bureau of the Budget that, subject to consideration by the Congress of certain other comments contained in a letter dated September 14 from its Acting Director to Senator O'Mahoney, a copy of which is attached, "there would appear to be no objection to enactment of S. 1311 if amended to assure the protection of the interests of the United States as recommended by the Department of Justice." This advice is,

I believe, equally applicable to H. R. 3544, the enactment of which I recommend with such amendments as are required in the light of the views expressed by Mr. Staats in the letter just referred to.

The Bureau of the Budget has advised that there is no objection to the submission of this report to your committee.

Sincerely yours,

OSCAR L. CHAPMAN
Secretary of the Interior

Enclosure.

EXECUTIVE OFFICE OF THE PRESIDENT
BUREAU OF THE BUDGET,
Washington, D.C., September 11, 1951

Hon. JOSEPH C. O'MAHONEY
United States Senate, Washington, D.C.

MY DEAR SENATOR O'MAHONEY: Receipt is acknowledged of your letter dated April 12, 1951, requesting our report on S. 1311, a bill granting the consent of Congress to a compact entered into by the States of Montana, North Dakota, and Wyoming relating to the waters of the Yellowstone River.

In response to my request for the views of the Department of Justice, the Deputy Attorney General indicates that while article XVI of the compact is apparently designed to protect the interests of the United States, the language used is rather ambiguous. The preservation of the rights of the United States is rendered somewhat obscure due to the possible conflicting interpretations of the terminology "area of waters" in the language "To impair or affect

the sovereignty or jurisdiction of the United States of America in or over the area of waters affected by such compact, any rights or powers of the United States of America, its agencies, or instrumentalities, in and to the use of the waters of the Yellowstone River Basin nor its capacity to acquire rights in and to the use of said waters."

He also calls attention to article V, B, of the compact under which the signatory States allot themselves all "unused and unappropriated waters of the interstate tributaries of the Yellowstone River" as possibly depriving the United States of the use of surplus water it has been anticipated would flow into the Missouri River.

Also in the Deputy Attorney General's opinion, the broad authority contained in the provision that the commission may sue and be sued might he construed, in view of the Federal representative thereon, to indicate that the Federal Government has waived its sovereign immunity from suit.

Finally, he recommends that in the event Congress should desire to approve the compact as drafted, such approval be essentially in the following language:

"*Be it enacted by the Senate* and *House of Representatives of the United States of America in Congress assembled*, That approval by the Congress is hereby given to the Yellowstone River Compact: *Provided, however*, That this approval of the Compact does not in any way subject the United States to the terms of the Compact or affect its sovereignty, jurisdiction, power, authority, rights to the use of water, property, prerogatives, or responsibilities in, to, or over the Yellowstone River and its tributaries."

The Secretary of the Interior, in his proposed report on H. R. 3544, the companion bill to S. 1311, expresses the opinion that the provisions in the compact for the selection of the Federal representative by the Geological Survey rather than the President and that the commission should be subject to suit are regrettable and that the latter "may raise some interesting constitutional questions in the future."

Similarly, conflicting provisions appearing in previously consummated compacts prompted the President on May 3, 1950, to write the Federal representatives on various compact commissions cautioning them to exert all efforts to eliminate or correct the areas of possible conflict which might impose restrictions on the use of waters by the United States.

This office is in agreement that the compact method is the proper and logical manner for States to allocate the waters of interstate streams. It is essential, however, that such compacts include adequate provisions to preserve the rights and interests of the United States and for appointment by the President of a Federal representative as a member of the compact commission. Since the Yellowstone River compact which would be approved by S. 1311 has been ratified by the States of Montana, North Dakota, and Wyoming, it may not now be feasible of revision to provide for the selection of the Federal representative by the President rather than by Geological Survey. While I believe that as a general rule the former is preferable, there may be some question whether in this case the resubmission of the compact to the States to provide for selection of a Federal representative by the President rather than by Geological

Survey is justified. It is of fundamental importance, however, that the compact protect the rights and interests of the United States in these waters. The language of the proposed amendment to the bill prepared by the Department of Justice would seem to provide such protection. Accordingly, subject to the consideration of the above comments by the Congress, there would appear to be no objection to enactment of S. 1311 if amended to assure the protection of the interests of the United States as recommended by the Department of Justice.

Sincerely yours,

ELMER B. STAATS, *Acting Director.*

The Committee on Interior and Insular Affairs unanimously recommends the enactment of H. R. 3544.

APPENDIX C

*Minutes of the Meeting of the

YELLOWSTONE RIVER COMPACT COMMISSION

Held in the Chamber of
Commerce Building, Billings, Montana

October 10, 1940

(The statements as given in these minutes are not verbatim, except as indicated by quotation marks)

Commissioner Clyde L. Seavey of the Federal Power Commission opened the meeting at 10:00 a.m. and asked Mr. Wing to make a statement covering the work of the Compact Commission to date.

Mr. Wing: Two previous meetings of the Compact Commission have been held. The first was held at Billings, Montana on May 5, 1938, and the second, at Thermopolis, Wyoming on November 21 and 22, 1938. The first meeting was held for the purpose of determining the information needed for drafting the Compact and how it might best be obtained. It soon became obvious that insufficient information regarding present and potential uses of water was available and that it would require considerable time in which to gather it.

At the meeting in Thermopolis a report was presented which contained such

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* As revised December 20, 1940, in accordance with corrections submitted by those in attendance.

information as had been collected up to that time. Based on this information, a "progress report" was drafted for submission to the State legislatures and to the Congress. Subsequent to the submission of this progress report, Congress passed an amendment to the act extending the time for the drafting of the compact, and also included North Dakota as a party to any agreement that might be entered into.

In addition to the data secured by the Compact Commission, information relating to existing and potential irrigation development in the Yellowstone Basin has also been compiled by the National Resources Planning Board. This information was compiled in the Omaha District Office of the U. S. Engineer Department under the direction of Lt. Col. W. M. Hoge. This information was subsequently made available to the Compact Commission and, to a large extent, has been incorporated in its latest revised report. Since the meeting at Thermopolis, the U. S. Bureau of Reclamation also has begun a survey of the irrigated and irrigable areas in the Big Horn Basin and in portions of the Yellowstone Basin above Billings. Additional and up-to-date information relating to irrigated lands and priorities of water-use is also being collected under the sponsorship of the Montana State College and the Montana Water Conservation Board. Mr. Donohue will presently submit a report of the work done by Montana. The U. S. Bureau of the Census has completed its decennial census of irrigation. The report of this census, which will be available in 1941, should contain data of value to the Compact Commission.

Such data as are now available have been compiled by the Federal Power Commission in a report that is now in draft form. It plans to submit the report in the near future to the members of the Compact Commission for their information and criticism.

Mr. Seavey: "Up to what date does the report cover?"

Mr. Wing: The report has been kept up to date insofar as possible. The Army has made a new survey, but this information has not yet been made available. Perhaps Colonel Hoge could tell more about it.

Col. Hoge: A new report of the Yellowstone Basin has been finished but has not yet been released.

Mr. Wing: "Were there many revisions?"

Col. Hoge: "Yes, there were revisions of the irrigable areas, but no further studies of water use have been made."

Mr. Simmons: The Indian Service is making a study of water use on the Big Horn.

Mr. Hanna: The Indian Service has already submitted figures on areas that are irrigated in Indian projects. These figures were gathered from the projects shortly after the last Compact Commission meeting. A new survey of irrigated and irrigable land is now in progress on the Big Horn. This survey is a check on water available and water use. It covers the Wind River Reservation and Crow Reservation.

Mr. Simmons: A major problem of the compact is the water rights of irrigable lands on the Crow Reservation in Montana, and the Wind River Reservation in Wyoming. At the first meeting of the Compact Commission, the case of United States vs. Powers over the waters of the Little Horn was discussed. In this case the United States, on behalf of its Indian wards and project water users, brought suit against individual irrigators not under Government ditches. The court decided that all landowners, whites and Indians alike, had treaty rights to irrigate all of their lands that were susceptible of irrigation. These rights date from the time of the treaty. Such rights are senior in the basin and may be taken up at any time in so far as Indian owned lands are concerned. There are thousands of acres in the Crow and Wind River Reservations that have never been irrigated. What would be the situation if these lands were brought under irrigation under the Powers decision? (59 S.Ct.R. 344). On the Crow and the Wind River Reservations about 75 percent of the lands are owned by Indians and about 25 percent by whites. The Indian lands cannot, under present laws, be alienated.

The subject of reservoirs came up, and, since the Boysen project was mentioned, Mr. Wing asked Colonel Hoge if he could give any information on this project.

Col. Hoge: Representatives of both Montana and Wyoming have had an opportunity to examine the report and somehow it managed to get into the newspapers. The review of the 308 Report is not as detailed as is generally believed. It

is concerned principally with flood control, and those tributaries having no flood control features were not examined thoroughly. Reservoir sites were examined and evaluated. It was concluded that the Lower Canyon site, the Boysen site, the upper and lower Big Horn Canyon sites and the Moorhead site were the best sites available. Water supply and foundations were studied. The report recommended that a dam be constructed on the Big Horn, but left the decision as to the site to the Chief of Engineers. The Boysen reservoir would have a capacity of about 3,000,000 acre-feet, and the lower Big Horn Canyon site would have a capacity of from 1,500,000 to 2,000,000 acre-feet. The other feasible sites included the Yankee Jim Canyon site, but the Big Horn sites were considered better. The general conclusion was that there was surplus of water that could be stored and used for irrigation and other purposes.

At a Denver meeting of the National Resources Planning Board about a year ago it was agreed that if state and other agencies would submit new information to the Omaha office, the Engineer Office would compile it and keep the data up to date. So far we have received no additional information since the first was gathered.

Mr. Wing: "Mr. Sloan, will you make a statement on the work the Bureau is conducting?"

Mr. Sloan: The Bureau of Reclamation is trying to carry on where other agencies left off. It is attempting to make a complete survey of the Yellowstone basin in order to determine the best use for water, not only for irrigation, but for other

purposes as well. The survey includes portions of the upper Missouri River basin, and follows down the main stem of the Missouri to the humid zone. The problem is more involved than had been anticipated. All areas that are potentially irrigable are being investigated, without careful study of the water supply, in order to find those projects which merit more detailed study. An attempt is being made to avoid duplicating work that has been done before, and data furnished by other agencies is used whenever it is available. For example, the Indian Service data has been used without checking.

The survey on the Big Horn is progressing. The work on the upper Wind River is about 70 percent complete. On the Yellowstone below Billings the survey is practically finished. On the main stem above Billings the work is almost 100 percent complete, but the work on the tributaries and on possible tie-ins with the Missouri, is far from finished. With adequate storage, the water supply on the main stem of the Yellowstone and on the Big Horn is ample for the needs of the irrigable area, although this is not true of a number of the tributaries. On the Tongue and Powder the situation is quite different. The water supply even with storage, is not sufficient to irrigate all the land susceptible of irrigation. The problem is further complicated by the maze of interstream diversions, by a wide choice of reservoir sites, and by the fact that the Wyoming portion of the basin is highly developed whereas the Montana portion has been developed to a minor degree.

Mr. Wing: "Will the report of the survey be made available within a year?"

Mr. Sloan: "Yes. It is best not to give out information until all the data are available. The best use of the water cannot be found until all of the possibilities have been investigated."

Mr. Brown: "Are you tabulating data on priorities in your survey?"

Mr. Sloan: "No."

Mr. Brown: "In my opinion that is the crux of the matter."

Mr. Sloan: "I don't think so. The problem is to provide an adequate supply by storage. With an adequate water supply, there is no problem of priorities."

Mr. Wing: Storage is going to be the answer to additional irrigation, but a tabulation of water rights should be made available if possible.

Mr. Brown: Montana is tabulating all of the priorities on the streams that have been adjudicated, and those that have been entered in the county records. This survey is an outgrowth of the Thermopolis meeting. We are getting information on the capacity of the ditches, irrigated acres, and dates of filings. This information is very necessary, and some agency should devote itself to the task of collecting it.

Mr. Wing asked Mr. Donohue if his report was ready. Mr. Donohue read and submitted a progress

report of the work done by Montana since 1938. A copy of this report is attached.

Mr. Monson: No systematic, up to date, record of water rights has been kept in Montana. They have accumulated over a period of about 75 years, from partial records kept in each county of the water filings in that county; but these records do not take into account appropriations from the same stream or its tributaries in other counties.

It has been said that because of exaggerated statements these filings, or records of appropriation, are of little or no value. But when the water rights on any stream are adjudicated the filings are very valuable in determining one of the most important facts pertaining to water rights, viz. the priority.

It is true that where the supply is adequate for the needs of all users priority of right may not be especially important, particularly if the amount of water available from the normal flow of the stream is adequate for all purposes. Indeed if such were the case we might forget the problem of water rights altogether. But if the available supply is insufficient for all uses, the questions of priority and of beneficial use both become very important. This is also true if part of the supply is derived from storage. Certainly those who are paying for the construction of reservoirs will not consent to the turning of the stored waters back into the stream for the benefit of other water users, who do not share in the cost of providing storage.

The project we have undertaken consists, among other things, of preparing a complete tabulation of all water rights on record in the state, and also of appropriations not covered by formal filing. Progress up to date consists in the transcribing of existing records in nearly all counties. The next step is to have these records verified by the water users themselves and to record other pertinent information which will bring the record up to date. It is planned to hold meetings or hearings in each county, at which water users will have an opportunity to examine and verify the existing record or to file a complete record covering rights not recorded at present. It is anticipated that this will involve a great deal of work.

Mr. Wing: When do you estimate that this work will be finished?

Mr. Monson: In one year, perhaps. We are concentrating on the counties in the Yellowstone Basin.

Mr. Wing asked for a report from Wyoming.

Mr. Bishop: Mr. Sloan has covered our progress in his report. Montana and Wyoming could cooperate on the Boysen dam. It would settle for all time the water problem on the Big Horn, including the silt problem.

Mr. Wing asked for a report from North Dakota.

Mr. McColly: Most of the acreage in North Dakota is in the Lower Yellowstone Project. The water rights for the other small projects are filed in the State Engineer's office.

Mr. Wing asked North Dakota to supply the same information that the other states had filed.

At Mr. Wing's request, Judge Stone discussed at some length the problems which confronted the states in making a compact, illustrating his points with examples from other basin compacts.

Mr. Stone: It is of the utmost importance to have all of the available information at the disposal of the Compact Commission. Most errors of past compacts can be traced to inadequate information at the time they were drafted. The Supreme Court has declared that decreed rights must give way when they exceed a state's equitable share of the stream. All factors must be considered in arriving at an equitable division between states, in order to avoid litigation years from now. Litigation is extremely expensive and must be avoided. The compact method is the best method of avoiding litigation. There should not be great concern over delay in the compact, for litigation is much slower. One law suit breeds another, and litigation, once started, never ceases.

Mr. Borwn [sic] reiterated that water right priorities were of great importance, and requested the Bureau of Reclamation to include them in its survey, if possible.

Mr. Simmons: The question arises as to who will pay for storage. The early rights are not interested in storage because they are entitled to receive adequate water.

Mr. Wing asked the Wyoming delegation if Wyoming would accept the water right priorities now being compiled by Montana. Mr. Bishop replied that Wyoming preferred to wait until the Bureau of Reclamation survey was finished, and suggested that a representative from Wyoming sit in on the county hearings to be held in Montana.

Mr. Brown: We are attempting to get only such facts as would be admitted as evidence before a court if there were actual litigation. If Wyoming will not accept the data we are collecting, the survey is a waste of money.

Mr. Searey: Do any other agencies have any information to present? If not, I suggest we recess for lunch, and that during the recess each state hold a caucus to determine whether or not the data on water rights now being collected by Montana will be accepted. If this evidence is accepted, it will not be necessary to wait until adjudications are made.

This procedure was agreed upon and the meeting recessed until 3:00 p.m.

Afternoon Session

Mr. Searey: Have the gentlemen from each state been able to reach an agreement among themselves?

Mr. Metz: To sum up – in order to make a compact that shall last for all time, two problems must be solved. They are, first, the condition

which prevails today, and, second, the future situation. Wyoming suggests that the actual beneficial use now made of water be declared the principal factor in dividing the water to meet the needs of the situation as it is today. Actual use of water on land is of more importance than priorities or court decrees. Wyoming will give full faith and credit to the surveys the Montana Board is now making, and will not take advantage of its superior position on water-right filings. Expert surveys must be made by a competent agency to determine water use, water supply, and potential areas. Wyoming is willing to accept the finding of the Bureau of Reclamation. For the future, the division of water should be made with regard to the potential uses in the basin. This involves:

1. Soil study
2. Type of agriculture
3. Population
4. Cost of irrigation

Some competent authority should make a survey of the irrigable land in the basin, and determine how much water would be required to irrigate it. If there is not enough water for all the land, the less desirable projects should be eliminated without regard to state lines. Some agency, such as the Bureau of Reclamation, should decide on the average duty of water for all the potential lands, and then the water could be divided equally on the basis of the number of acres in each state. Wyoming is willing to accept the Bureau of Reclamation's estimate for the water duty.

Mr. Seavery: Do I understand that you went the Bureau to determine an average use of water for all potential lands, without regard to state lines, and that the states will divide the water among themselves on the basis of potential area in each state?

Mr. Metz: Yes. That the water be divided between the states proportionately to the irrigable area. It would be a mass allocation, and each state could distribute its share as it pleases.

Mr. Bishop: If an upper state promises a lower state a definite amount, the upper state will suffer in a dry year. The water available each year must be divided proportionately each year.

Mr. Brown: There is going to be an interval before storage can be developed when shortages will occur, and consideration must be given to existing priorities during this interval. Our legislature is not going to enter into a compact that does not protect the priorities of the irrigators.

Mr. Wing: May I suggest that the present supply in the dry years be divided on the basis of present use, and that storage water and surplus water in wet years be divided on the basis of the number of potential acres in each state.

Mr. Metz: Yes. We must not foreclose the future of any state in our endeavor to alleviate the present condition.

Mr. Brown: That's true. No one is going to sign a compact that closes the future.

There followed a discussion on reservoir sites on the Big Horn, but it was agreed that it was not the duty of the Compact Commission to recommend reservoir sites to the Army Engineers.

There was a discussion of the desirability of submitting a progress report to the legislatures.

There followed a discussion of Indian rights, particularly of the fear that the states might be "haggling over someone elses' bone". The Indian lands are a minor portion of the entire basin but have prior rights.

Mr. Scavey: I asked the Secretary of the Interior to appoint someone to represent the Indians. The Office of Indian Affairs is making a survey of the needs of the Indians, and will submit a report of the findings to the Compact Commission.

Mr. Wing: It might be well to include in the compact a clause providing for subsequent rights of the Indians.

Mr. Metz requested Judge Stone to make available to the Compact Commission copies of the Rio Grande and La Plata Compacts. Judge Stone agreed to send them this material, together with copies of the proceedings.

Mr. Scavey: "Then is it agreed that Montana go ahead with its survey of water rights as planned?"

Mr. Metz: "Yes for Wyoming."

Mr. Whitney: "It is agreeable with North Dakota."

Mr. Seavey: Since Montana is including information of the actual use of water at present in its survey, would Wyoming and North Dakota be willing to collect this information in their states to supplement the water right filings?

Mr. Metz: I cannot speak definitely for the State Engineer[1], but I believe that Wyoming would rather accept the Bureau of Reclamation survey of water use. The water use in Wyoming is less than the decreed appropriations.

Mr. Whitney: We will cooperate to the fullest extent possible and get as much information as we can.

Mr. Wing: When this work was initiated two years ago we prepared an outline which each state was to follow in collecting data. We will send a copy of the outline to North Dakota.

There followed a discussion on the type of progress report that should be prepared. It was agreed that the Federal Power Commission would submit to each state copies of the report which it now has in draft form. Each state would be requested to criticize the report and to make any necessary corrections. It might then be found advisable to submit an abridged report to the state legislatures in order to keep them informed of the general direction of the negotiations. An effort will be made to have the abridged report prepared by January 1941.

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[1] Mr. Bishop was not present at this time.

The meeting adjourned at 4:30 p.m.

A list of those attending the meeting is given on the following page.

Name	Organization and Title	Address
Clyde L. Seavey	Member, Federal Power Commission	Washington, D. C.
E. B. Winter	Montana Member, Compact Commission	Miles City, Montana
H. F. McColly	Secretary and Chief Engineer, North Dakota Water Conservation Comm.	Bismarck, N. D.
Frank P. Whitney	N. D. Member, Compact Commission	Dickinson, N.D.
Lt. Col. Wm. M. Hoge	District Engineer, U.S. Engineer Department	Omaha, Nebraska
W. G. Sloan	U. S. Bureau of Reclamation	Denver, Colorado
H. M. Tice	Assistant State Engineer	Helena, Montana
J. W. Emmert	Yellowstone National Park	Yellowstone Park
Wesley A. D'Evart	Montana Member, Compact Commission	Wilsall, Montana
E. Walter Hunke	State Supervisor, W.P.A. Research Projects	State College, Bozeman, Montana

O. W. Monson	Montana State College	Bozeman, Montana
Carl G. Krueger	Forest Supervisor, Shoshone National Forest	Cody, Wyoming
Clifford H. Stone	National Resources Planning Board	Denver, Colorado
L. A. Campbell	Forest Service, Region 1	Missoula, Montana
Walter L. Schipull	Forest Service, Region 2	Denver, Colorado
Fred E. Buck	Secretary, Montana State Planning Board	Helena, Montana
L. C. Bishop	Wyoming State Engineer and Wyoming Inter-state Streams Commissioner	Cheyenne, Wyoming
E. B. Donohue	Montana Member, Compact Commission	Helena, Montana
C. J. Dousman	Attorney, Montana Water Board	Helena, Montana
R. G. Lyman	W.P.A. District Supervisor, Water Resources Projects	
Rockwood Brown	Montana Water Board and member of Compact Commission	Billings, Montana

L. F. Thornton	Member, Wyoming Planning and Water Conservation Board; Member, Compact Commission	Thermopolis, Wyo.
Will G. Metz	Wyoming Member, Compact Commission	Buffalo, Wyo.
Kenneth R.L. Simmons	District Counsel, Indian Service	Billings, Montana
W. S. Hanna	District Engineer, Indian Service	Billings, Montana
J. C. Cory	W.P.A.	Butte, Montana
O. Leon Anderson	Area Conservationist, Soil Conservation Service	Billings, Montana
Edgar Reeves	State Coordinator, Soil Conservation Service	Laramie, Wyoming
L. S. Wing	Federal Power Commission	Denver, Colorado
H. O. Caperton	Federal Power Commission	Denver, Colorado

Submitted by: H.O. Caperton, Federal Power Commission, Secretary of the Meeting.